Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GERALD D.W. NORTH,

Petitioner,

v.

SUPREME COURT OF ARIZONA and
STATE BAR OF ARIZONA,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Arizona

PETITION FOR WRIT OF CERTIORARI

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96 pp

QUESTIONS PRESENTED

1. Whether Rule 53(e) of Arizona's Rules of Supreme Court is invalid under the Fourteenth Amendment to the United States Constitution because it permits the imposition of disciplinary sanctions – including suspension and disbarment – without an attorney ever being entitled to a hearing before any court.

2. Whether the Arizona Supreme Court's Judgment and Order denied Petitioner procedural due process where it adopted, without review, a Disciplinary Commission sanction recommendation that conflicts on its face with a prior decision of that Court.

3. Whether the Arizona Supreme Court's Judgment and Order denied Petitioner substantive due process where it adopted, without review, a Disciplinary Commission recommendation disciplining Petitioner for conduct that responsible attorneys regarded as ethical.

PARTIES IN THIS PROCEEDING

The Petitioner in this proceeding is the individual respondent attorney in the disciplinary proceedings below: Gerald D.W. North.

The Respondents in this proceeding are: the Supreme Court of Arizona, through the Attorney General of the State of Arizona, and the State Bar of Arizona, a not-for-profit corporation established or continued by the Supreme Court of Arizona, through its Executive Director.

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment and orders of the Arizona Supreme Court in *In the Matter of Gerald D.W. North, Attorney No. 9913*, Nos. SB-01-0001-D and SB-01-0037-D.

JUDGMENT AND ORDERS BELOW

The Order of the Arizona Supreme Court dismissing, but not striking, Petitioner's Notice of Appeal from the November 30, 2000, decision of the Disciplinary Commission was entered on February 28, 2001, and is reprinted in the Appendix at 1a. The Order of the Arizona Supreme Court denying Petitioner's Petition for Review was entered March 20, 2001, and is reprinted in the Appendix at 3a. The Amended Judgment and Order of the Arizona Supreme Court, annexing and adopting the Disciplinary Commission's report, was entered March 28, 2001, and is reprinted in the Appendix at 4a. The Order of the Arizona Supreme Court denying Petitioner's Motion for Reconsideration was entered on April 24, 2001, and is reprinted in the Appendix at 17a.[1]

[1] In addition to the judgment and orders below, Petitioner has included in the Appendix the notice of appeal, petition for review, and motion for rehearing; a portion of the transcript of proceedings before the Disciplinary Commission; and a single exhibit introduced by Petitioner in the proceedings below. Portions of the record below not included in the Appendix are cited as "RA ___."

JURISDICTION

The Order of the Arizona Supreme Court dismissing Petitioner's appeal was entered on February 28, 2001. (App. 1a.) A timely motion for reconsideration was denied on April 24, 2001. (App. 17a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Fourteenth Amendment to the United States Constitution states in pertinent part: "no State shall . . . deprive any person of life, liberty, or property, without due process of law."

Rule 31, R.S.Ct. provides in pertinent part:

> [A]cting within the powers vested in it by the constitution of this state and its inherent power over members of the legal profession . . . the Supreme Court of Arizona does hereby perpetuate, create, and continue under the direction and control of this court an organization known as the State Bar of Arizona, such organization which may be a non-profit corporation. . . . "

As of November 30, 1996, Rule 53(e), R.S.Ct., provided:

> (e) **Review by the Court.** Respondent or the state bar may appeal to the court from a commission recommendation of censure, suspension or disbarment within ten days from the date of service of the commission report. . . .

Effective December 1, 1996, Rule 53(e), R.S.Ct., provides in pertinent part:

(e) **Review by the Court.**

1. *Petitions for Review.* Within 30 days after service of a commission report recommending censure, suspension, or disbarment, respondent or the state bar may file . . . a petition for review by the supreme court.

* * *

5. *Order Granting Review.* If the court grants review, its order shall specify the issue or issues which are to be reviewed. . . .

* * *

11. *Standard of Review.* The court reviews questions of law de novo. In reviewing findings of fact, the court shall apply a clearly erroneous standard.

Rule 71, R.S.Ct., provides in pertinent part:

(c) **After Suspension for Six Months or Less.** A member suspended for six months or less who desires to resume the practice of law may . . . file with this court and serve upon the state bar an affidavit in lieu of an application for reinstatement. . . . If no response is filed, the state bar shall be deemed to consent to reinstatement, and the member may resume the practice of law. . . .

(d) **After Suspension for More Than Six Months.** A member suspended for more than six months may apply for reinstatement. . . .

* * *

(h) **Proof of Rehabilitation.** Reinstatement following summary suspension or suspension of six months or less shall not require proof of

rehabilitation. Reinstatement following suspension of more than six months or disbarment shall require that proof of rehabilitation be demonstrated in a reinstatement proceeding. . . .

STATEMENT OF THE CASE

Background of Petitioner. Petitioner is an attorney admitted to practice in the states of Iowa, Illinois and Arizona. At the time he retired from active practice and moved to Europe in 1996, Petitioner had a national reputation as an antitrust trial lawyer. He has never been the subject of disciplinary action in Iowa or Illinois.

Petitioner has been a member of the Bar of this Court since 1982 and has appeared on briefs and in argument before the Court.

Until 1981, Petitioner was associated with the Chicago law firm of Sidley & Austin, and was an attorney in the government and private antitrust litigation relating to the breakup of the American Telephone & Telegraph Company. In 1981, he became a name partner in the Chicago law firm of Brace & North, and was the No. 2 lawyer involved at the time in the *Sealy* antitrust litigation.[2]

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[2] Petitioner authored the petition for writ of certiorari in *Ohio-Sealy Mattress Manufacturing Company v. Sealy, Inc.*, 669 F.2d 490 (7th Cir.), *cert. denied*, 459 U.S. 943 (1982), involving the issues of *per se* illegality, erroneous remittitur and post-verdict damages.

In the mid 1980s, Petitioner relocated to Arizona where he founded North & Barron, a 13-lawyer, 60-employee law firm in Phoenix, and its successor, a comparably sized firm with offices in Phoenix and Philadelphia. Among many other cases, Petitioner served as lead counsel for the class in the *Title Insurance Search and Examination Services Antitrust Litigation* (*Brown v. Ticor Title Ins. Co., et al.*, 982 F.2d 386 (9th Cir. 1992), 511 U.S. 117, 128 L.Ed.2d 33 (1994)), involving some 500,000 purchasers of real estate in Arizona and Wisconsin, successfully arguing the latter case in this Court in March 1994, two years before he retired.[3]

Delay in Commencement of the Proceedings Below. In April 1998, the State Bar of Arizona filed a complaint against Petitioner primarily based on charging letters received in 1994 from nine of fifty-three clients in a multi-party case (*Ramirez, et al. v. CCI, Inc.*, hereinafter "*CCI*") that was brought by Petitioner's former partner in 1991 and settled by Petitioner in 1993.[4] The charging letters were sent to Petitioner for response on July 11, 1994, but a probable cause order was not entered until April 19, 1995, and the April 1995 probable cause order did not result in a complaint until April 24, 1998, a delay of three years. (App. 14a.)

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[3] Following this Court's *per curiam* decision dismissing the writ granted the defendants (511 U.S. 117), the *Ticor* case was remanded to the Federal District Court in Arizona where a final settlement was approved by now Chief Judge Stephen McNamee in late 1995, shortly before Petitioner retired.

[4] The allegations relating to *CCI* comprise counts 1-10 of the State Bar's 12-count amended complaint.

As of April 1998, when the Complaint was filed, 290 probable cause orders were backlogged at the State Bar, with no corresponding complaint filed. (App. 61a.)[5]

Prejudicial Effect of Delay. During the period of delay, Petitioner's former partner, who retired in 1992 and moved to Australia, became unavailable; Petitioner retired from active practice and moved to Europe; most of the relevant files became unavailable;[6] and other defense witnesses, such as the forty-four non-complaining *CCI* clients, could no longer be located. In oral argument before the Disciplinary Commission, Bar Counsel conceded that, had the forty-four absent *CCI* clients been available, the outcome below could have been different (App. 55a-56a.):

> [Commission Mbr. Rubin]: . . . Isn't it possible that Mr. North could have brought in 20 or 30 or 40 of these plaintiffs that chose not to bring a complaint and if they had testified . . . couldn't that have changed the outcome of this case?
>
> [Bar Counsel]: It possibly could . . .

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[5] Laches was an asserted affirmative defense from the outset of the proceedings below, but Bar Counsel did not disclose the existence of the State Bar's 290-case backlog during discovery, mentioning it for the first time at a January 21, 2000, hearing on Petitioner's motion to dismiss for laches, a few days before it was to be publicized by the State Bar's executive director in the February 2000 issue of *Arizona Attorney* magazine. (App. 61a-62a.) Although disclosure of the backlog came after the close of discovery, Petitioner's motion to reopen discovery was denied. (App. 14a.)

[6] At the time the 1995 probable cause order was entered, the law firm's files were still indexed and readily accessible. By 1998, they had become unavailable (RA 38, 113).

Even the memory of the witnesses who were available and testified for the Bar had seriously dimmed by the time of the hearing. During a two-day hearing on March 2-3, 2000, witnesses repeatedly testified to poor or non-existent recollection of material events, conversations and documents. See, *e.g.*, RA 106 ("I would say that I don't recall a lot of things. I mean a lot of time has gone by."); RA 63 ("I can't answer that honestly from '91 to 2000"); RA 68 ("It is really hard to remember some of these things, it's been so long"); RA 80 ("I don't recall that. It was many years ago.").

Non-Service of the Bar's Original Complaint; Amendment of the Complaint. The complaint was never actually "served." It was couriered to Petitioner's residence in Monte Carlo, Monaco in mid 1998 (RA 134). No service under Arizona Supreme Court Rule 55 which requires that a complaint be served either personally (pursuant to the Hague Convention, in the case of a non-resident of the United States) or by registered *and* regular first class mail – was ever attempted or effected by the State Bar. Nevertheless, in October 1998, Petitioner answered the complaint.

In December 1998, Petitioner traveled to Arizona and met with Bar Counsel to discuss the charges. During this meeting, Bar Counsel stated that had she understood the facts, the charges would have been resolved informally but that things had "gone too far" (RA 48, 51). Shortly thereafter, the State Bar filed an amended complaint, greatly expanding the number of charges.

The Disciplinary Commission Decision. On March 2-3, 2000, an evidentiary hearing was held before a Hearing

Officer. Petitioner again traveled from Europe to attend the hearing and defend the charges, arriving the night before the hearing. Following the entry of findings of facts and conclusions of law, Petitioner sought review before the Disciplinary Commission. Although Petitioner was able to call only one witness, other than himself, compared to fifteen witnesses called by the State Bar, on review the Commission rejected three-quarters of the violations found by the Hearing Officer as unsupported by the evidence and reduced a recommended three-year suspension to six months plus one day. (App. 9a.) It sustained what it viewed as thirty-three violations, thirty of which pertain to the 1994 allegations. (App. 9a-10a.)[7]

With respect to the 1994 allegations, the Commission sustained violations of ER 1.4, 1.7(b) and 1.8(g), but rejected all other violations. (App. 9a, 8a-9a.) It rejected Petitioner's laches defense, notwithstanding the three-year delay and Bar Counsel's admission of possible prejudice, treating the delay as a mitigation factor only. (App. 14a.) It provided no explanation of its resolution of the ethical issues presented for review.

In assessing sanctions, the Commission considered a single mitigating factor – the State Bar's delay – and ignored all other factors. (App. 13a-14a.) It found that Petitioner had substantial experience in the practice of law – an aggravating factor – but failed to find Petitioner

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[7] The number of violations reflects the fact that, following the December 1998 meeting with Bar Counsel, the State Bar realleged the same violations as to each of the nine 1994 complainants in ten separate counts of an amended complaint, although they originally were alleged in a single count.

had a good reputation as an attorney – a mitigating factor – although the same uncontroverted evidence equally supported both findings. It gave no consideration to the absence of any prior disciplinary history[8] or to Petitioner's substantial success in defending the charges advanced by the State Bar.[9] It gave no consideration to Petitioner's four years of inactive status;[10] the amendment of the State Bar's complaint to artificially inflate the number of alleged violations;[11] or Petitioner's consultation with other experienced counsel regarding the ethical dilemma involved in the 1994 allegations.[12]

In recommending a sanction of six months *plus one day,* explicitly to require Petitioner to reapply and prove

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[8] To the contrary, the Commission considered as an aggravating factor a private informal reprimand involving a $426 dispute between Petitioner's former law firm and a former client of another lawyer in the firm (RA 144-45) where there was no other disciplinary history in Petitioner's 25-year career. (App. 13a n.14.)

[9] The Commission treated Petitioner's refusal to acknowledge the wrongful nature of his conduct as an aggravating factor even though he prevailed on 73 of the 106 charges asserted by the State Bar in its amended complaint. (App. 13a.)

[10] *Compare In re Murray,* 159 Ariz. 280, 283 (1988) (reducing prospective sanction "in consideration of Petitioner's lengthy self-imposed retreat from the practice of law, during which the filing of a formal complaint against him was unaccountably delayed").

[11] The Commission treated the number of violations as an "aggravating" factor. (App. 13a.) Compare *In re Levine,* 174 Ariz. 146, 171-72 (1993) (rejecting aggravation based on multiple counts alleging same operative facts).

[12] But see App. 56a-57a.

fitness to practice before being reinstated (App. 14a-15a.), the Commission ignored the Arizona Supreme Court's decision in *In re Hoover,* 161 Ariz. 529, 534 (1989) which rejected an identical six months *plus one day* sanction as an "unusual" and inappropriate attempt by the Commission to concern itself with reinstatement procedures.

Prosecution and Settlement of the CCI Litigation. Over 90 percent of the violations alleged by the State Bar relate to the prosecution and settlement of the *CCI* litigation. *CCI* was settled by Petitioner on October 15, 1993. The case was originally filed by Petitioner's former partner in 1991 on behalf of two clients who claimed repetitive motion injuries (carpal tunnel syndrome) from use of defendant CCI's computer keyboards as US West directory assistance operators. On January 29, 1991, the lead plaintiff signed a fee agreement with North & Barron under which she was to pay an initial cost retainer of $300 each for herself and her husband but would be liable for all costs and subject to requests for additional retainers. Subsequently, a group of some fifty additional co-workers and their spouses joined the case on identical terms.[13]

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[13] On March 1, 1991, Petitioner's former partner confirmed an "absolutely confidential" off-the-record deal to cap the lead plaintiff's costs at $300.00 in light of her "extraordinary effort" in helping bring other plaintiffs into the case (RA 52-53, 58-59). It was undisputed that Petitioner had no involvement in the intake process and was unaware of his partner's "confidential" deal with the client just prior to her obtaining over 40 of her co-workers as clients (RA 59, 148). After the October 15, 1993, settlement, the lead plaintiff, unhappy with her failure to obtain meaningful recovery in a case she had promoted, tried to organize 45 of the plaintiffs to file bar complaints against

Barron, Petitioner's former partner, last lived in Australia and was unavailable to testify. Petitioner was not involved in the initial client meeting and could not testify of his own knowledge that the clients had been advised of potential conflicts of interest in a multiparty case (RA 148). The legal representation agreement indicates that they were (RA 150-56, ¶¶1.02(e) and 3.02). The State Bar's witnesses could only "vaguely" recall what was discussed in the initial meeting because "[i]t's been a long time" (RA 66, 81, 97). Some did not recall what was discussed at all (RA 103). One did not recall having an initial meeting (RA 61). Another did not recognize her own executed legal representation agreement (RA 66) ("I really don't remember this to be honest with you,") and exclaimed: "How could I remember ten years ago?" (RA 67)

In May 1992, Barron announced she would be retiring. Petitioner began to explore having a firm with a products liability practice associate as co-counsel. Petitioner contacted three different personal injury specialist firms or attorneys, including the firm that had settled a virtually identical case for US West operators in Colorado. All declined because of problems they saw in proving causation, because many plaintiffs had only minor injuries and because US West had workmen's compensation liens on any recovery. One of those who reviewed

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Petitioner. Only nine agreed to do so (RA 99-100). At the hearing, several of the complainants "mirror-imaged" each other's testimony even where they independently had no personal knowledge or recollection (RA 105-6). The Hearing Officer himself acknowledged Petitioner's characterization of the situation was a "fair comment on the evidence" (RA 148-49).

the file was William Revis, a certified personal injury litigator with 32 years' experience, formerly President of the Arizona Trial Lawyers Association (RA 123-24). Revis was the only defense witness to testify at the hearing, other than Petitioner.

Barron retired in November 1992 and North & Barron's successor firm accepted the *CCI* file at that time with the consent of all clients after advising them of the qualifications of the newly assigned partners and their right to seek new counsel (RA 162A-B). The case was thereafter staffed by two partners in the firm's Philadelphia office, two associates in its Phoenix office, and a full-time paralegal.

In April 1993, Petitioner personally took over the case following the separation of the firm's Philadelphia office. Although primarily known as an antitrust lawyer, Petitioner was unquestionably qualified to try the case. Revis testified (RA 125, 127-28):

> [H]e was one of the primo antitrust lawyers in the country. . . . Jerry had a reputation in this community and nationally . . . and his reputation was impeccable in the type of huge cases that he handled, and while he may not have any experience in handling a products liability case before, he certainly could have educated himself in the necessary things that he would have to have to have proven it. I knew that from his preparation of the case and I don't have any problem at all with that.

There were two motions for summary judgment pending at the time. Petitioner successfully defeated the

motion on product defect. However, the best expert testimony obtainable was clearly inadequate to defeat the motion on causation (RA 137).[14]

Petitioner judged that plaintiffs would lose the motion, scheduled to be heard on October 18, 1993, and the case would be dismissed. Revis concurred in this assessment (RA 125-126). The State Bar did not dispute it (App. 58a.):

> Q. [Commission Mbr. Rubin] . . . [T]he Bar- . . . isn't disputing the independent professional judgment that Mr. North made, that . . . [the case] is going to be dismissed in the summary judgment?
>
> A. [Bar Counsel] No, I don't think we are contesting that . . . [15]

Settlement discussions began late August 1993 (RA 137). The discussions proceeded with the October 18 deadline in mind, complicated by the defendant's lack of interest in settling and nearly $1 million in liens by US West (RA 189-91). By the time a settlement amount had been reached with CCI, and an award structure with US

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[14] The best evidence on causation – that it was "merely theoretical" – was plainly insufficient to avoid summary judgment under either *Frye v. United States*, 54 App. D.C. 46, 293 F.1013 (1923) or this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which was handed down during briefing of the summary judgment motions. See RA 125-26.

[15] The subsequent history of a parallel class action against computer console manufacturers confirms that Petitioner's judgment was correct. The class action was tried to verdict – a defense verdict.

West, there were only a few days left to contact the fifty-three plaintiffs before the hearing (RA 137). Extensive telephone calls were undertaken personally by Petitioner (RA 114, 118, 131, 137). All but three clients were contacted and consented (RA 118). Most were advised of the large amount of costs for which they were liable, that the case would probably be dismissed, that the US West liens would otherwise bar recovery, that there would be differential recoveries in the settlement, and that most would receive no net recovery (RA 137, 56). Petitioner provided a detailed explanation of the proposed settlement structure to those who were interested (RA 114).

Petitioner was openly troubled by the prospect of settling without all clients' consent, but, after consultation with Revis, concluded he had no other option (RA 49-50, 126-27, 190-91). Counsel for CCI, a witness for the State Bar, summarized the situation in a letter to his client on October 26, 1993, eleven days after the settlement (RA 190-91):

> North . . . did not believe he could conclude the case by agreeing . . . on behalf of those he could not contact. . . . The impending date of October 18, 1993, and the hearing on Defendant's Motion for Summary Judgment produced an atmosphere of time being of the essence. The fact that Mr. North had received authority from most of his clients to conclude the case . . . , the desire to conclude the matter before October 18, . . . all resulted in the creation of an agreement to permit Final Judgment to enter. . . .

Revis testified (RA 127):

> But the question was was it ethical to do that. I have the agreement by everyone except the people I can't reach . . . I said here's your choice, file a motion to withdraw [from representation of the unreachable clients] . . . That doesn't help you. . . . [T]he defendant doesn't want to settle unless all plaintiffs signed off on it . . . So you've prejudiced all the other plaintiffs, and I suggested to him that I did not know the answer to this question. I don't know anybody who knows the answer to that question, but I can't imagine if he did what he was planning on doing that he could be criticized for that when as I saw it the only one who was losing any money on this was him . . . As a practical matter I didn't see it as a bad result. . . .

From inception to conclusion, Petitioner and his firms devoted over $1,025,000 in time to the case (RA 136, 119-20, 206). Some $207,000 in costs were advanced over the small client retainers (RA 120, 100). The case was "settled" for $296,477 (RA 191). Had this been treated as an "aggregate" settlement, Petitioner would have received 33-1/3 percent and the balance would have been insufficient to cover the outstanding costs. Plaintiffs would have received nothing and still owed money (RA 120). Instead, plaintiffs consented to entry of a judgment in favor of CCI, CCI provided a settlement fund, and Petitioner worked out settlement details with US West. The settlement structure entailed: (1) individual settlement awards based exclusively on each plaintiff's relative

workmen's compensation profile;[16] (2) US West's waiver of its liens on all positive net recoveries; and (3) Petitioner's waiver of outstanding costs due by plaintiffs with negative net recoveries. The most seriously injured plaintiffs who had not already been dismissed received a positive, and in some cases meaningful, recovery and no plaintiff was left with a cost balance (RA 119, 120, 126-27).

Each client received a closing letter reflecting the settlement structure, their specific award[17] and the amount of fees and costs that were deducted therefrom (RA 185-86). Under the settlement structure devised by Petitioner, most of the nearly $100,000 fee to which Petitioner was entitled was voluntarily disbursed – effectively to the most injured clients. Petitioner received a total of $18,000 in "fees" (actually interest charges on the advanced costs); over $1,000,000 in time was written off (RA 119, 127).

Proceedings in the Arizona Supreme Court. On December 11, 2000, within ten days of service of the Commission's report, Petitioner filed a notice of appeal with the Arizona Supreme Court with respect to the "thirty" violations that relate to the 1994 allegations. (App. 18a.)

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[16] The only exception was 17 previously dismissed plaintiffs whose claims were barred by limitations and had nominal value at best. These plaintiffs recovered a flat nuisance-value award. Five of the nine complaining clients fall into this category. Three of the nine were the clients Petitioner could not reach.

[17] The "aggregate" amount of the settlement was also disclosed (RA 98).

Petitioner's notice of appeal acknowledged that it was being filed under Rule 53(e) of the Arizona Supreme Court's Rules *as that rule existed on November 30, 1996. Id.* Effective December 1, 1996, Rule 53(e) was amended to eliminate appeals as of right in disciplinary cases and to provide only for discretionary review. Petitioner pointed out that, had that State Bar prosecuted the 1994 charges diligently, Respondent would have had the right to an appeal. (App. 18a-19a.) On December 15, 2000, the State Bar objected to Petitioner's notice of appeal and moved that it be stricken.

On January 2, 2001, in the absence of a ruling on the State Bar's objection and motion, Petitioner filed a timely petition for review under present Rule 53(e) with respect to the remaining three violations, including in his petition the "thirty" 1994 violations to which the notice of appeal also was directed. (App. 24a.)[18] Among other things, the petition pointed out that ER 1.4 contemplates that an attorney may act for an unreachable client in exigent circumstances. Ariz. R.S.Ct. 42, ER 1.4, comment ("Practical exigency may also require a lawyer to act for a client without prior consultation.").

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[18] The three minor violations based on counts 11 and 12 of the State Bar's amended complaint were not included in Petitioner's notice of appeal because there was little or no relationship between the State Bar's delay on those allegations and the date of the 1996 amendments to Rule 53(e) and, thus, no basis for contending that the Arizona Supreme Court should follow the former procedure. Compare Order, December 4, 1967, 43 F.R.D. 113 (U.S.Sup.Ct., 1967) (new rules apply to proceedings then pending "except to the extent . . . their application in a particular proceeding . . . would work injustice, in which case the former procedure may be followed").

On February 28, 2001, the Arizona Supreme Court dismissed Petitioner's appeal because "[p]ursuant to Rule 53(e), Rules of Supreme Court, Respondent's avenue of review of the decision of the Disciplinary Commission is the petition for review process." (App. 1a.) It denied the State Bar's motion to strike.

On March 20, 2001, the Arizona Supreme Court denied Petitioner's petition for review. (App. 3a.) On March 22, 2001, Petitioner filed a motion for reconsideration of the order dismissing his appeal. (App. 50a.) Petitioner's motion reiterated that the Commission's sanction recommendation improperly relied on reinstatement considerations, noting that it was inconsistent on its face with the *Hoover* decision. Petitioner also contended, *inter alia,* that the Court's refusal to accept his appeal had denied him both procedural and substantive due process and that Rule 53(e), as amended, was invalid under the Fourteenth Amendment. (App. 51a.)

On March 28, 2001, the Arizona Supreme Court entered its Amended Judgment and Order, suspending Petitioner for six months *plus one day* pursuant to the Disciplinary Commission's report. (App. 4a.) On April 24, 2001, it denied Petitioner's motion for reconsideration without opinion. (App. 17a.)

REASONS FOR GRANTING THE WRIT

I. RULE 53(e) OF ARIZONA'S RULES OF SUPREME COURT VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY PERMITTING SANCTIONS – INCLUDING SUSPENSION AND DISBARMENT – TO BE IMPOSED ON AN ATTORNEY WITHOUT THE RIGHT TO A HEARING BEFORE A COURT OF ORIGINAL JURISDICTION

The principal question presented by the petition implicates what appears to be a growing trend in many states to adopt "discretionary review" procedures in attorney disciplinary cases that permit decisions of state bar committees or commissions to become final without obligatory judicial review.

The Fourteenth Amendment to the United States Constitution guarantees broad protection to persons charged with criminal violations. Somewhat lesser protections are afforded in civil and other contexts, but this Court has characterized attorney suspension and disbarment proceedings as "quasi-criminal" in nature. *In re Ruffalo*, 390 U.S. 544, 551, *rehearing denied*, 391 U.S. 961 (1968). See also *Erdmann v. Stevens*, 458 F.2d 1205, 1209-10 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972) (disciplinary proceedings are more "comparable to a criminal rather than a civil proceeding" because the potential loss of the license to practice, as well as professional reputation, constitute a more significant punishment than a monetary fine). Thus, while a state has a legitimate interest in establishing procedures to discipline attorneys subject to

its jurisdiction, attorneys should not be disciplined "without full and unquestioned due process of law." *Law Students Civil Rights Research Counsel, Inc. v. Wadmond*, 401 U.S. 154, 185 (1963) (Black and Marshall, J.J., dissenting).

Fundamentally, due process requires an opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). But to satisfy due process, an opportunity to be heard must be meaningful. And to be meaningful, an opportunity to be heard must be an opportunity to be heard by the tribunal that possesses the power to decide the case and impose the sanction. *In re Noell*, 93 F.2d 5 (8th Cir. 1937). In many, if not most, states, however, attorney disciplinary proceedings are handled in the first instance by administrative or private associative bodies, such as Arizona's Disciplinary Commission, and an appeal to the state supreme court is often the only opportunity for a hearing before a court of original jurisdiction.

In *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. 74, 80 (1930), this Court held that due process does not compel a state to provide a right of appeal, *provided* there has been an opportunity for hearing in a lower court:

> [I]t is sufficient to say that . . . the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance [citations omitted]. The opportunity afforded litigants in Ohio to contest all . . . questions fully in the Common Pleas Court and again in the Court of Appeals plainly satisfied the requirements of the Federal Constitution in this respect . . .

By a parity of reasoning, where a state does *not* provide for a hearing in a lower court, due process does require it to provide the right of appeal. Compare *Mildner v. Gulotta*, 405 F.Supp. 182 (E.D.N.Y. 1975), *aff'd without opinion sub nom. Levin v. Gulotta*, 425 U.S. 901 (1976) (dismissing § 1983 challenge to constitutionality of New York disciplinary procedure).[19]

Rule 53(e) of Arizona's Rules of Supreme Court, as amended, plainly fails to accord attorneys in Arizona the minimal level of due process protection contemplated by *Akron Metropolitan Park District*. An attorney charged with misconduct is accorded due process *neither* in a "tribunal of first instance" *nor* by the "right of appeal." All of the proceedings of "first instance" – including the evidentiary hearing itself – occur before a non-judicial hearing officer and are reviewed by a disciplinary commission composed of attorneys and non-attorney members of the public. None of the proceedings are assigned to a court. The only court of original jurisdiction in disciplinary cases in Arizona is the Arizona Supreme Court which alone has the power to sanction an attorney. See *In*

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[19] Under New York's procedure, at issue in *Gulotta*, exclusive power to discipline attorneys was assigned to the Appellate Division of each department of the Supreme Court in the state. In the Appellate Division of the Second Department, a referee conducted the evidentiary hearing, but the referee's findings were in no way binding on the Appellate Division, which was free to substitute its judgment, even on issues of credibility. In the Appellate Division of the First Department, a bar committee conducted the hearings on complaints against attorneys, but the Appellate Division held a trial *de novo* before any disciplinary action could be taken. See *Erdmann v. Stevens, supra.*

re Hoover, supra, at 530 n.1, 537. The *only* opportunity an Arizona attorney ever has to be heard by a court is his appeal to the Arizona Supreme Court, yet that court does not hear the evidence and, under amended Rule 53(e), need not accept briefs, entertain oral argument, render an opinion, or accord any form of review at all.

Prior to 1996, the due process implications of Arizona's procedure for disciplining attorneys were much less severe. Even though the Arizona Supreme Court did not itself hear the evidence, an attorney was at least guaranteed an appeal to a court with original jurisdiction over disciplinary cases. The Arizona Supreme Court was free to substitute its judgment for that of the trier of fact because, "[i]n disciplinary proceedings, [that] court act[ed] as an independent 'trier of both fact and law.' " *In re Loftus,* 171, Ariz. 672, 674 (1992). Under amended Rule 53(e), however, discretionary review by the Arizona Supreme Court is by no means guaranteed. In the majority of cases, including the case at bar, the Arizona Supreme Court simply adopts the recommendations of a non-judicial body – the Disciplinary Committee – without comment or explanation, "no discretionary review occurring." (App. 3a.) The subject attorney never receives a hearing before *any* court. And even if he does, he will find himself bound by the findings of the non-judicial bodies below unless he can satisfy the rigorous requirements of the clearly erroneous rule.

The infirmity of Rule 53(e) under the due process clause of the Fourteenth Amendment is further highlighted by comparing it to the protections Arizona affords civil litigants. The 1996 amendments that made Arizona

Supreme Court review discretionary in attorney disciplinary cases also made review discretionary in ordinary civil cases. In civil cases, however, there will have been a trial in a court of original jurisdiction – the Superior Court – followed by an appeal as of right to the Court of Appeals. Only in attorney disciplinary cases is it possible, and indeed probable, that a party will *never* receive a hearing – evidentiary or otherwise – before *any* court. In light of the "quasi-criminal" nature of disciplinary proceedings, the due process protection provided an attorney charged with misconduct should be greater, not less, than those provided civil litigants.[20]

II. THE ARIZONA SUPREME COURT'S JUDGMENT AND ORDER VIOLATED PETITIONER'S PROCEDURAL DUE PROCESS RIGHTS BY FAILING TO CORRECT A DISCIPLINARY COMMISSION'S SANCTION RECOMMENDATION THAT IS FACIALLY INCONSISTENT WITH A PRIOR DECISION OF THAT COURT

It is axiomatic that the guarantee of procedural due process is violated when a court fails to follow its own rules or standards. *In re Thalheim*, 853 F.2d 383, 386-88

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[20] Given the existence of a prior procedure that accorded, for many years, obligatory review in the Arizona Supreme Court, there can be no contention that dispensing with the appeal as of right in disciplinary cases is necessary to accomplish some legitimate state interest. Presumably, the prior system also served the state's purpose of preserving the public's confidence in its judiciary and protecting the public from unfit attorneys, without sacrificing the legitimate interests of attorneys subject to disciplinary charges to receive a hearing in court.

(5th Cir. 1988) (court violated procedural due process by "failing to follow its own requirements."). Here, the Arizona Supreme Court failed to follow its own sanctioning standards.

In re Hoover held that the "unusual" sanction of six months *plus one day* was an inappropriate attempt by the Disciplinary Commission to concern itself with reinstatement procedures (161 Ariz. at 534):

> [T]he evident purpose of the Commission's [six months and one day] recommendation was to ensure that respondent could be reinstated only under the protracted procedures required under Rule 72, the general reinstatement rule, rather than under Rules 71 or 73 . . .
>
> We do not believe it appropriate to allow concerns about reinstatement procedures to affect the ultimate conclusion as to the proper length or type of sanction . . . [21]

In this case, the Arizona Supreme Court imposed the same "unusual" six-month *plus one day* sanction it criticized and rejected in *Hoover,* without comment or explanation.

The failure of the Arizona Supreme Court to correct the sanction recommendation of the Disciplinary Commission illustrates in a particularly pointed way the deficiency of Arizona's procedure of discretionary review

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[21] In Arizona, a suspension of more than six months requires a relatively onerous reinstatement proceeding under Rule 72, whereas these requirements do not apply to suspensions of six months or less. *Compare* Rule 71(c) with Rule 71(d) and (h).

under the due process clause. It could be that the Arizona Supreme Court's affirmance was inadvertent. Perhaps it simply did not focus on this defect in the Commission's recommendation, even though it was pointed out by Petitioner. That deficiency surely would have been cured during briefing and oral argument had there been obligatory review. And while it is difficult to conceive of a basis for not applying *Hoover* in Petitioner's case, the Arizona procedure of discretionary review practically guaranteed there would be no guidance from the Arizona Supreme Court if its adoption of the Commission's recommendation was intentional. That deficiency also would have been cured had the Arizona Supreme Court been required to accept the appeal, consider the issues, and render an opinion.

III. THE ARIZONA SUPREME COURT'S JUDGMENT AND ORDER VIOLATED PETITIONER'S SUBSTANTIVE DUE PROCESS RIGHTS BY DEPRIVING HIM OF THE OPPORTUNITY TO PRACTICE HIS PROFESSION IN ARIZONA ON THE BASIS OF CONDUCT REGARDED AS ETHICAL BY RESPONSIBLE ATTORNEYS

The Petition also presents an important question of substantive due process namely, the limitations imposed by the Fourteenth Amendment on a state's power to deprive an attorney of the opportunity to practice his profession where responsible attorneys would regard the attorney's challenged conduct as ethical.

In *In re Ruffalo, supra,* Justice White, in a concurring opinion joined by Justice Marshall, observed that a federal court may not, consistent with due process, deprive

an attorney of the right to practice his profession on the basis of an "after the fact" determination that conduct is unethical where "responsible attorneys would differ in appraising the propriety of that conduct." *Id.* at 555-56. The Petition presents the question whether the *Ruffalo* concurrence should be adopted by this Court and applied to the states through the Fourteenth Amendment.

The principle enunciated by Justice White in *Ruffalo* should be equally applicable in state disciplinary cases in general, and this case in particular. The due process guarantees of the Fifth and Fourteenth Amendments are practically coterminous. See *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760, 766 n.6 (3d Cir. 1989). Moreover, this case presents an *a fortiorari* situation in which *none* of the attorneys who considered the matter differed on the appropriateness of Petitioner's ethical decision. Even CCI's counsel did not dissent. Significantly, no witness was called by the State Bar to offer a contrary opinion.

Consideration of the consequences had Petitioner made the opposite decision is also instructive. Had Petitioner *refused* to conclude the settlement, the case predictably would have been dismissed, and it is almost certain that the other plaintiffs would have complained of Petitioner's *failure* to settle their claims. Given this "catch 22" situation, Petitioner's decision to prefer the concrete pecuniary interests of fifty clients over the abstract, and wholly theoretical, interests of three, plainly was a reasonable – if not the only reasonable – exercise of professional judgment under the circumstances.

CONCLUSION

The Court should grant the writ of certiorari to decide the constitutional validity of Arizona's procedure of discretionary review in attorney disciplinary cases. It should also review the Arizona Supreme Court's failure to follow its own sanctioning standards. And it should decide the issue addressed in the concurring opinion in *In re Ruffalo,* and apply its conclusion to the states through the Fourteenth Amendment.

Respectfully submitted,

GERALD D.W. NORTH
3977 East Paradise View Drive
Paradise Valley, AZ 85253
(602) 956-7708
Pro Se

SUPREME COURT OF ARIZONA

In the Matter of GERALD D.W. NORTH, Attorney No. 9913 Respondent.	Arizona Supreme Court No. SB-01-0001-D Disciplinary Commission No. 94-1324 ORDER (Filed Feb. 28, 2001)

Respondent Gerald North filed a Notice of Appeal from the November 30, 2000 decision of the Disciplinary Commission in Disciplinary Commission No. 94-1324. The State Bar filed an Objection to Respondent's Notice of Appeal and Motion to Strike. North filed a response. Pursuant to Rule 53(e), Rules of the Supreme Court, respondent's avenue of review of the decision of the Disciplinary Commission is the petition for review process. Accordingly,

IT IS ORDERED that Respondent Gerald North's appeal is dismissed.

IT IS FURTHER ORDERED that the State Bar's Motion to Strike is denied.

DATED this 28th day of February, 2001.

/s/ Charles E. Jones
CHARLES E. JONES
Vice Chief Justice

TO:
Gerald D.W. North, Respondent (Certified Mail)
Shauna Miller, Bar Counsel, State Bar of Arizona
Kendra Diegan, Clerk, Disciplinary Commission

krc

(SEAL)

Supreme Court

STATE OF ARIZONA

[Names And Addresses Omitted In Printing]

March 21, 2001

RE: In the Matter of GERALD D.W. NORTH
Arizona Supreme Court No. SB-01-0037-D
Disciplinary Commission Nos. 94-1324, 95-0497, and 97-2063

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on March 20, 2001, in regard to the above-referenced cause:

ORDERED: Motion to Strike Portions of the State Bar's Response to Respondent's Petition – DENIED.

FURTHER ORDERED: Petition for Review – DENIED.

Formal order to follow.

Noel K. Dessaint, Clerk

TO:
Gerald D.W. North
Shauna R. Miller, Bar Counsel, State Bar of Arizona
Maret Vessella, Bar Counsel, State Bar of Arizona
Kendra A. Diegan, Clerk, Disciplinary Commission
Betty Flores, Director, Membership Records, State Bar of Arizona

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SUPREME COURT OF ARIZONA

In the Matter of GERALD D.W. NORTH, Attorney No. 9913 Respondent.	Arizona Supreme Court No. SB-01-0037-D Disciplinary Commission Nos. 94-1324, 95-0497 and 97-2063 AMENDED JUDGMENT AND ORDER (Filed Mar. 28, 2001)

This matter having come on for hearing before the Disciplinary Commission of the Supreme Court of Arizona, it having duly rendered its decision and no discretionary review occurring, and the Court having denied the respondent's Petition for Review, it is

ORDERED, ADJUDGED AND DECREED that **GERALD D.W. NORTH,** a member of the State Bar of Arizona, be and hereby is suspended from the practice of law in the State of Arizona for six months and one day, effective as of the date of this Judgment and Order, for conduct in violation of his duties and obligations as a lawyer, as disclosed in the Disciplinary Commission Report attached hereto as Exhibit A.

IT IS FURTHER ORDERED that pursuant to Rule 63(a), Rules of the Supreme Court of Arizona, GERALD D.W. NORTH shall notify all of his clients, if any, within ten (10) days from the date hereof, of his inability to continue to represent them and that they should promptly retain new counsel, and shall promptly inform

this Court of his compliance with this Order as provided by Rule 63(d), Rules of the Supreme Court of Arizona.

IT IS FURTHER ORDERED that Respondent **GERALD D.W. NORTH** shall pay restitution to Patrick G. Henry in the amount of $1,869.93 plus interest at the rate of 10% per annum from August 1994.

IT IS FURTHER ORDERED that **GERALD D.W. NORTH** shall be assessed the costs and expenses of these proceedings together with interest at the legal rate from the date of this judgment.

DATED this 28th day of March, 2001.

/s/ Thomas A. Zlaket
THOMAS A. ZLAKET
Chief Justice

TO:
Gerald D.W. North, Respondent (Certified Mail)
Shauna Miller, Bar Counsel, State Bar of Arizona
Allen B. Shayo, Chief Bar Counsel, State Bar of Arizona (Cert. Copy)
Kendra A. Diegan, Clerk, Disciplinary Commission (Cert. Copy)
Betty Flores, Director, Membership Records, State Bar of Arizona (Cert. Copy)
Marnie Leinberger, MCLE/BLS Administrator, State Bar of Arizona
Cynthia Zwick, Executive Director, State Bar of Arizona
Richard Weare, Clerk, United States District Court, District of Arizona (Cert. Copy)
Cathy Catterson, Clerk, United States Court of Appeals, Ninth Circuit (Cert. Copy)
William Suter, Clerk, United States Supreme Court (Cert. Copy)

E.G. Noyes, Jr., Chief Judge, Court of Appeals, Division One, Phoenix, Arizona
Philip G. Espinoza, Chief Judge, Court of Appeals, Division Two, Tucson, Arizona
Michael C. Nelson, Presiding Judge, Apache County, Arizona
Stephen M. Desens, Presiding Judge, Cochise County, Arizona
H. Jeffery Coker, Presiding Judge, Coconino County, Arizona
Robert Duber, II, Presiding Judge, Div. II, Gila County, Arizona
R. Douglas Holt, Presiding Judge, Graham County, Arizona
Monica L. Stauffer, Presiding Judge, Greenlee County, Arizona
Michael Irwin, Presiding Judge, La Paz County, Arizona
Colin F. Campbell, Presiding Judge, Maricopa County, Arizona
Gary R. Pope, Presiding Judge, Mohave County, Arizona
Gloria J. Kindig, Presiding Judge, Navajo County, Arizona
Gordon T. Alley, Presiding Judge, Pima County, Arizona
William J. O'Neil, Presiding Judge, Pinal County, Arizona
Roberto C. Montiel, Presiding Judge, Santa Cruz County, Arizona
Raymond W. Weaver, Jr., Presiding Judge, Yavapai County, Arizona
Tom C. Cole, Presiding Judge, Yuma County, Arizona
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BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF AN INACTIVE MEMBER OF THE STATE BAR OF ARIZONA, **GERALD D.W. NORTH,** **Bar No. 009913** RESPONDENT.	98-01-0037-01 Comm. Nos. 94-1324, 95-0497, 97-2063 **DISCIPLINARY COMMISSION REPORT** (Filed Nov. 30, 2000)

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on September 16, 2000, pursuant to Rules 53(d)(1) and (3), Ariz.R.S.Ct. The Commission considered the Hearing Officer's report filed June 7, 2000, recommending a three (3) year suspension without credit for inactive status.[1] The Respondent and the State Bar filed an objection and requested oral argument. The Respondent and the State Bar were present. The State Bar argued for disbarment or at least a three (3) year suspension, restitution and costs. Respondent argued for dismissal, or remand for further discovery on the issue of laches, or if any sanction imposed, it should be retroactive.

[1] Respondent went on inactive status in January of 1997.

Decision

The Commission's standard of review is set forth in Rule 53(d)(2), Ariz.R.S.Ct., which states that the commission reviews questions of law *de novo*. Upon review of the record on appeal the seven[2] members of the Commission considering this matter unanimously adopts the Hearing Officer's findings of fact but modifies some of the conclusions of law and recommends a sanction based upon a *de novo* and proportionality review.

The Commission gives great deference to hearing officer recommendations. *Matter of Petrie*, 154 Ariz. 295, 742 P.2d 796 (1987). The Commission however, reviews *de novo* the Hearing Officer's conclusions of law regarding a violation of ER 1.2 (scope of representation) in Counts 1-10 and Count 12, ER 1.3 (diligence) in Counts 11 and 12, ER 1.5(c) (fees) in Count 11, ER 1.15(a) in Counts 1-10 and Count 11, ER 1.16(d) (declining or terminating representation) in Count 12, ER 5.3(c) (responsibility regarding nonlawyer assistants) in Count 11, ER 8.1(b) (failing to respond to lawful request from the disciplinary authority) in Count 11, ER 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and (d) (conduct that is prejudicial to the administration of justice) in Count 1-10, SCR, 31(c)(3) (membership admission/fees) in Count 12, SCR 43 (a) and (d) – guideline 2d (trust account

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[2] Commissioner Funkhouser recused. Commissioners Bowman, Carson and McGrath did not participate in these proceedings. Cynthia L. Choate, a lawyer from Tucson; Craig B. Mehrens, a lawyer from Phoenix; and Dr. Jack L. Potts, a former public member from Phoenix, participated as ad hoc members. One public seat remains vacant.

verification) in Counts 1-10 and Count 11, 44(b)(3) (trust accounts; interest thereon) in Counts 1-10 and Count 11, and SCR 51(h) (failing to respond to bar inquiry) and (i) (failure to cooperate with the State Bar) in Count 12.[3] The Commission determined the evidence contained in the record on appeal does not support a finding of said violations.

Therefore, the Commission recommends a six (6) month and one (1) day suspension, restitution to Patrick G. Henry, in the amount of $1,869.93 plus interest at the rate of 10% per annum from August 1994, and costs of these disciplinary proceedings.

Discussion of Decision

The Commission determined Mr. North's conduct violated Rule 42 of the Arizona Rules of the Supreme Court, specifically,

ER 1.4 (communication) 11 Violations[4]

ER 1.7(b) (conflict materially limited by the lawyers responsibility to a third party) 10 Violation[5]

ER 1.8(g) (aggregated settlement without consultation or disclosure or participation of each person) 10 Violation[6]

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[3] Although the Hearing Officer does not list the ethical violations in his report per se, he does discuss them extensively in his conclusions of law, *See* Hearing Officer report, pp. 11-13 ¶ 1-20.

[4] Counts 1-10 and Count 12.

[5] Counts 1-10.

[6] Counts 1-10.

ER 1.15(b) (notify/deliver client funds/property) 2 Violations[7]

Respondent was admitted to the State Bar of Arizona in January of 1985. A complaint was filed in April of 1998 and was mailed to his address of record, pursuant to Rule 31(c)(3).[8] In Counts 1-10, the Complaint alleges that Respondent's misconduct arose from his representation of 53 plaintiffs in a product liability suit[9] against the manufacturer of a computer keyboard. Respondent failed to disclose a conflict of interest, failed to provide information to clients to make an informed decision regarding settlement, failed to convey settlement offers to all plaintiffs, failed to consult with all plaintiffs regarding the classification of plaintiffs and coerced some plaintiffs into settling in violation of ERs 1.4, 1.7(b) and 1.8(g).

Count 11 involved the representation of a client in a securities matter, which resulted in an award of $12,500.00. Respondent failed distribute the award monies to the client in a timely manner in violation of ER 1.15(b).

Count 12 involved the representation of four clients in hotel partnership investment. Respondent failed to communicate adequately with his clients and failed to produce a file upon one client's request in violation of ERs 1.4 and 1.15(b).

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[7] Counts 11 and 12.

[8] Although the Respondent asserts that service was not effectuated, the Hearing Officer and the Commission did not find his arguments persuasive.

[9] The Hearing Officer inadvertently identified this case as a class action suit. *See* Hearing Officer's report, p. 6 ¶ 8.

Respondent was summarily suspended on April 28, 2000 for nonpayment of dues. It was vacated on October 31, 2000. Despite Respondent's self imposed inactive status, Respondent stated at oral argument that settlement discussions in the Laventhol and Horwath matter (Count 12) had begun three days prior and a settlement offer was made.[10]

In determining the appropriate sanction, our Supreme Court considers the ABA *Standards for Imposing Lawyer Sanctions ("Standards")* a suitable guideline. *In re Kaplan*, 179 Ariz. 175, 877 P.2d 274 (1994). The Supreme Court and the Commission are consistent in utilizing the *Standards* to determine appropriate sanctions for attorney discipline. In imposing a sanction after a finding of misconduct, consideration is given to the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating and mitigating factors. *See Standard* 3.0.

The Commission reviewed the *Standards* and applied 4.12, 4.32, and 4.42 in relation to Respondent's particular misconduct. The Commission, as well as the Hearing Officer, determined suspension is an appropriate disposition in this case.

In regards to the misconduct in Counts 1-10, *Standard* 4.3 addresses Failure to Avoid Conflicts of Interest; 4.32 specifically provides:

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[10] Mr. North stated he was not aware of his membership status, which was suspended. *See* Commission transcript, p. 16:11.

> Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict and causes injury or potential injury to a client.

Respondent failed to contact all plaintiffs, failed to obtain the consent of all plaintiffs to settle the matter, agreed to an aggregate settlement, failed to avoid conflicts of interest, and independently and without his clients' consent decided the amount of each plaintiffs' award. Respondent also violated his duty owed to the public[11] when he failed to avoid conflicts which would impair the lawyer's independent judgment.

In regards to the misconduct in Count 11, *Standard* 4.12 provides:

> Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

Respondent was aware he owed money to the client and acknowledged such. Respondent stated at oral argument that he will satisfy the outstanding amount.[12]

In regards to Respondent's misconduct in relation to Counts 1-10, and Count 12, *Standard* 4.42 provides:

> Suspension is generally appropriate when:
>
> (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

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[11] *Standard* 4.0.

[12] *See* Commission transcript, pp. 18-19.

Respondent failed to communicate with his clients and intentionally misled his clients in two (2) matters. Respondent's clients were injured in that they were unable to make informed decisions regarding their case.

The Commission, having concluded that suspension is warranted, reviewed *Standards* 9.22 and 9.32, aggravating and mitigating factors, respectively.[13]

The Hearing Officer found seven (7) factors present in aggravation: 9.22(a) (prior disciplinary offenses),[14] (c) (pattern of misconduct), (d) (multiple offenses), (g) (refusal to acknowledge wrongful nature of conduct), (h) (vulnerability of client), (i) (substantial experience in the practice of law), and (j) (indifference to making restitution). The State Bar also argued for (b) (dishonest or selfish motive), (e) (bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency) and (f) (submission of false evidence, false statements, or other deceptive practices during the disciplinary process). The Hearing Officer did not find these three (3) factors. The Commission agrees with the Hearing Officer's finding of seven (7) aggravating factors.

In mitigation, the Commission, as well as the Hearing Officer, determined one (1) significant factor is present:

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[13] Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. *See Standard* 9.31.

[14] Respondent received a private informal reprimand in 1994 for violating ER 1.15 and Rule 43(a). Respondent disputed this factor.

9.32(j) (delay in disciplinary proceedings). The Commission notes that the State Bar took 36 months to file the Compliant after a finding of probable cause in File No. 94-1324, 24 months in File No. 95-0497 and 17 months in File No. 97-2063.

In considering Respondent's issue of laches, the Commission determined the Hearing Officer was correct that the Respondent failed to prove he had been prejudiced by the delay. The Commission determined mitigation was the appropriate place for consideration of this delay and gave it the appropriate weight. Further the Commission does not believe it is necessary to remand this matter to conduct discovery on the State Bar's disciplinary case backlog.

The Commission considered the proportionality analysis provided by the parties and the Hearing Officer. Based upon the Commission's *de novo* review of the Hearing Officer's conclusions of law, the Commission did not find any of the cases offered to be instructive and independently conducts its own proportionality analysis.

In *Matter of Horton*, SB-98-0068-D (1999), the respondent was suspended for two (2) years for violating ERs 1.3, 1.4(a) and (b), 1.5(a), 1.15(b), 1.7, 1.8(g), 5.3(b), 8.1(a), and 8.4(c). While the conduct in *Horton* does not parallel the conduct in this instant matter, the suspension is supported by the holding of similar ethical violations. The Commission believes the Respondent's misconduct in this instant matter warrants a lengthy suspension. However, due consideration is given for the significant delay in the processing of these cases. Therefore, Respondent's suspension is shortened to six (6) months and a day, which

will require the Respondent to reapply and prove fitness to practice, pursuant to Rules 71 and 72.

Conclusion

One purpose of lawyer discipline is to deter the Respondent and other attorneys from engaging in similar unethical conduct. *In re Kleindienst*, 132 Ariz. 95, 644 P.2d 249 (1982). Another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29 881 P.2d, 352, 362 (1994). The sanction that we impose must help maintain the integrity of the legal system. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). Therefore, having considered Respondent's misconduct, application of the *Standards*, including factors present in aggravation and mitigation, and a proportionality analysis, the Commission recommends a six (6) month and one (1) day suspension, restitution and costs of these disciplinary proceedings.

RESPECTFULLY SUBMITTED this 29th day of November, 2000.

/s/ David D. Dodge, Chair
Disciplinary Commission

Copies of the foregoing were mailed this 30th day of November, 2000, to:

Joseph J. Lodge
Hearing Officer 9V
230 North First Avenue, Room 4000
Phoenix, AZ 85025-0085

Gerald D.W. North
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Shauna R. Miller
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State Bar of Arizona
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KENDRA A. DIEGAN
Disciplinary Clerk

By /s/ Michele C. Smith

[SEAL]

Supreme Court

STATE OF ARIZONA

[Names And Addresses Omitted In Printing]

April 27, 2001

RE: In the Matter of GERALD D.W. NORTH
Arizona Supreme Court No. SB-01-0001-D
Disciplinary Commission No. 94-1324

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 24, 2001, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration – DENIED.

FURTHER ORDERED: Motion for Stay Pending Petition for Writ of Certiorari – DENIED.

Noel K. Dessaint, Clerk

TO:
Gerald D.W. North
Shauna R. Miller, Bar Counsel, State Bar of Arizona
Kendra A. Diegan, Clerk, Disciplinary Commission

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BEFORE THE SUPREME COURT

OF THE STATE OF ARIZONA

In the Matter of an inactive Member of the State Bar of Arizona **GERALD D.W. NORTH** **Bar No. 009913** Respondent	**Comm. No. 94-1324** **Notice of Appeal** **(FILED DEC 11 2000)**

Respondent hereby appeals, as a matter of right, the decision of the Disciplinary Commission dated November 20, 2000, and served upon Respondent on December 1, 2000, insofar as it addresses File No. 94-1324, pursuant to Rule 53(e), Rules of Supreme Court, as that Rule existed on November 30, 1996.

Respondent is aware that, effective December 1, 1996, Rule 53(e) was changed to provide only for a petition for review within 30 days of a Commission decision and intends to present such a petition with respect to File Nos. 95-0497 and 97-2063 in due course. However, as of November 30, 1996, Rule 53(3) provided for the right to an appeal, rather than the right to petition for review. Respondent claims a right to appeal inasmuch as the charging letters in File No. 94-1324 were received on July 28, 1994, and a probable cause order was issued on April 11, 1995, but no complaint was filed by the State Bar until April 24, 1998, fully three years (36-1/2 months) later. As of November 30, 1996, 19-1/2 months had already elapsed since the probable cause order – a period exceeding the 17 months regarded by this Court as unreasonable.

Had File No. 94-1324 been diligently prosecuted by the State Bar, Respondent would have been entitled to file an appeal with this Court, within ten days of receiving the Commission's decision, as a matter of right. Failure to permit an appeal would therefore deprive Respondent of important rights solely because of the State Bar's extraordinary three-year delay in prosecution.[1]

Wherefore, Respondent respectfully appeals the decision in File 94-1324 and presents the following issues for review.[2]

ISSUES PRESENTED

I

(Laches and Estoppel)

Whether the commission erred in its determination that Respondent failed to prove he had been prejudiced by the Bar's delay, and in its refusal, in the alternative, to remand the case for further discovery, where the record established beyond dispute that, solely due to the Bar's

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[1] In the proceedings below, Respondent, who ceased active practice in Arizona in 1995 and lived outside the United States after late 1996, raised the defense of laches based on the 36-month delay in 94-1324 and the 24-month delay in 95-0497. The Commission rejected the laches defense, except in mitigation, disregarding the clear prejudice Respondent suffered as a result of the unavailability of relevant files and witnesses and the admitted inability of the complaining witnesses to recall certain relevant events.

[2] When Respondent files his petition for review on the other two files, he will cross-reference this appeal and request that the two proceedings be consolidated.

mid-1990s case backlog, the complaint in File No. 94-1324 was not filed until more than three years after the probable cause order; where the Bar's own witnesses repeatedly testified to poor or non-existent recollection of events, some ten years old; where key defense witnesses and documents became unavailable to Respondent during the period of the Bar's unreasonable delay; and where Bar Counsel failed to disclose the existence of the Bar's 290-case backlog either in discovery or in her Rule 26.1 Disclosure Statement.

II

(Vicarious Disciplinary Liability)

Whether the Commission improperly imposed vicarious liability upon Respondent (see ER 5.1) by finding a violation of ER 1.7(b) where the underlying case in question was a multi-party case involving 53 clients brought by Respondent's former name partner in North & Barron in 1991; where Respondent did not have any involvement in the case nor direct supervisory authority over the lawyers who handled the case, at that time; where the complaining witnesses had no recollection whether they had, or had not, been given specific advice by Ms. Barron in 1991 regarding the potential conflict of interest inherent in a multi-party case and Ms. Barron was unavailable to testify but where the clients' 1991 legal representation agreements specifically referred to the potential for conflicts of interest in a multi-party case; where partners in North & Barron's succession firm, North & Vaira, did not take over the case until two years later, following Ms.

Barron's retirement; where North & Vaira, while technically a "new" corporate entity, was in all material respects, from the clients' point of view, the same law firm with only a change of name; and where Respondent did not personally undertake direct supervision of the case until April 1993, over three years after it was filed and less than six months before it was settled.

III

(Aggregate Settlement)

Whether the Commission erred in finding a violation of ER 1.4 and ER 1.8(g) where (1) Respondent settled this complex but problematic multi-party case without the prior consent of three, or at most four, out of 53 clients, under exigent circumstances where the non-contacted clients could not be reached in the time available, the Defendant refused to settle without including the claims of the uncontacted clients and the other clients would seriously have been prejudiced had the case not been settled; (2) the aggregate settlement fund was insufficient to provide a net recovery to *any* client, after recovery of costs and payment of attorneys fees, and would otherwise belonged to the clients' common workmen's compensation lienholder; (3) the individual awards released from lien by the workmen's compensation lienholder were funded out of what would otherwise have been Respondent's fees, which Respondent waived; and (4) there was no other possible method of settlement and virtually no chance of success on the merits.

IV

(Communication)

Whether the Commission erred in concluding that Respondent "coerced" some of the clients into settlement where the only possible "coercion" consisted of (1) Respondent truthfully advising the clients that the case, which was scheduled for a hearing on a dispositive motion for summary judgment in a matter of days, would likely be dismissed (a statement whose truthfulness the Bar does not contest); (2) Respondent truthfully advising the clients that they would be responsible for their share of some $207,000 in costs if the case were dismissed (a statement whose truthfulness was unrebutted); and/or (3) respondent's statement to the client's that all other clients to whom he had spoken *as of the time of each individual client communication* had authorized Respondent to settle (a statement that would indisputably have been true but was characterized by five of the Bar's witnesses as an unqualified statement that all of the other clients had agreed to settle, a nuance that was entitled to no weight given the passage of nearly seven years since the conversations occurred and the unavailability of 44 of the 49 or 50 clients Respondent did contact, as well as Respondent's notes of the conversations).

V

(Non-Service of Complaint)

Whether the complaint should have been dismissed where Respondent was a retired inactive member residing outside the United States, where the only available

long-arm statute does not permit mail service, and where the complaint was served *neither* personally, under the provisions of the Hague Convention, *nor* by registered *or* regular first class mail, under the provisions of Rule 55, Rules of Supreme Court.

VI

(Sanction)

Whether the six months plus one day sanction imposed by the Commission with respect to File Nos. 94-1324, 95-0497 and 97-2063 should be reduced proportionately where the great majority of the violations determined by the Commission were found with respect to File No. 94-1324.[3]

Dated this 11th day of December, 2000.

/s/ Gerald D.W. North
Gerald D.W. North
Pro Per

Copy mailed this 11th day of December, 2000, to:

Shauna R. Miller
State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, AZ 85003-1742

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[3] The State Bar's complaint contained 12 counts, 10 of which relate to File No. 94-1324.

BEFORE THE ARIZONA SUPREME COURT

In the Matter of an Inactive Member of the State Bar of Arizona, GERALD D.W. NORTH Bar No. 009913, Respondent.	Comm. No. 94-1324, 95-0497, and 97-2013 **PETITION FOR REVIEW** **(FILED JAN 02 2001)**

SYNOPSIS OF COMMISSION DECISION

The decision below reviewed a hearing officer's report regarding alleged violations of ethical rules in three unrelated files.[1] The Commission rejected the majority of violations as unsupported by the evidence and reduced a recommended three-year suspension to six months plus one day (RA 228-29). The Commission sustained what it viewed as thirty-three violations, thirty of which pertain to 94-1324.[2]

In 94-1324 (Counts 1-10), the Commission sustained violations of ER 1.4, 1.7(b) and 1.8(g), but rejected all other violations (RA 228-29, 31). It rejected Respondent's laches defense, notwithstanding the over 36-month delay

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[1] 94-1324 is also the subject of an appeal as of right filed December 11, 2000.

[2] The large number of violations reflects the fact that the Bar realleged the same violations as to each of the nine complainants in 94-1324 in nine separate counts of an amended complaint, although they originally were alleged in a single count (RA 3-5), and the Commission treated the tenth count (RA 28-29), relating solely to the ER 1.7(b) violation, as if it were a general count (see RA 229).

in prosecution and Bar counsel's admission that Respondent may have been prejudiced (RA 232-33, 218). In 95-0497 (Count II), the Commission sustained a single violation of ER 1.15(b), rejected all other alleged violations, including ER 5.3(c) (responsibility for conduct of non-lawyer assistants), and rejected laches (RA 228-29, 30). In 97-2063 (Count 12), it sustained a violation of ER 1.4 and 1.15(b), but rejected all other violations (RA 228-29, 30).

In assessing sanctions, it considered but a single mitigating factor – the Bar's delay – and ignored all other factors (RA 232-33). The Commission also rejected Respondent's service of process defense notwithstanding the Bar's admission that it did not serve the complaint in accordance with Rule 55 (RA 229, n. 8).

ISSUES PRESENTED FOR REVIEW

I.

(Non-Service of Complaint)

Whether the complaint should have been dismissed where Respondent was an inactive member residing outside the United States, the complaint was served *neither* personally, pursuant to the Hague Convention, *nor* by registered *or* regular first class mail, pursuant to Rule 55(b)(2), and there was no order permitting the substitute form of service employed.

II.

(Counts 1-10 – Laches; Vicarious Liability; Communication; Aggregate Settlement)

A. Laches

Whether the Commission erred in concluding that Respondent failed to prove prejudice where the record established beyond dispute that, solely due to the Bar's mid-1990s case backlog, the complaint in 94-1324 was not filed for more than three years after the probable cause order; the Bar's witnesses repeatedly testified to poor or non-existent recollection of material events, some ten years old; key defense witnesses and documents became unavailable during the delay; and Bar Counsel conceded that their availability could have changed the outcome.

B. Vicarious Disciplinary Liability

Whether the Commission improperly imposed vicarious liability under ER 1.7(b) where the underlying multi-party case was brought by Respondent's former partner in North & Barron in 1991; Respondent had neither direct supervisory authority nor knowledge at the time; the complaining witnesses had no recollection whether they had, or had not, been advised about the potential conflict of interest inherent in a multi-party case and Barron was unavailable to testify but the clients' legal representation agreements specifically referred to the potential conflict; Respondent assigned partners in North & Barron's successor firm to the case following Barron's retirement and did not personally undertake representation until April 1993, six months before it was settled.

C. Communication

Whether the Commission erred in concluding Respondent "coerced" some clients into settlement where the "coercion" consisted of truthfully advising the clients that the case, which was scheduled for a hearing on a dispositive motion for summary judgment in a matter of days, would likely be dismissed (a statement the Bar does not dispute); truthfully advising the clients they would be responsible for some $207,000 in costs if the case were not settled; and/or informing the clients that other clients to whom he had spoken *as of that time* had authorized the settlement, a statement that was indisputably true but was characterized by several Bar witnesses as an unqualified statement that *all* other clients had consented, a nuance entitled to no weight given the passage of seven years since the conversations and the unavailability of 44 of the clients as well as Respondent's contemporaneous notes.

D. Aggregate Settlement

Whether the Commission erred in finding a violation of ER 1.4 and ER 1.8(g) where Respondent settled a complex but problematic multi-party case without the prior consent of three, or at most four, out of 53 clients, under exigent circumstances where the non-contacted clients could not be reached in the time available, the Defendant refused to settle without including the claims of the uncontacted clients and the other clients seriously would have been prejudiced had the case not been settled; the aggregate settlement fund was insufficient to

provide a net recovery to *any* client, after costs and attorneys fees, and would otherwise have belonged to the clients' common workmen's compensation lienholder; the *individual* awards released from lien by the workmen's compensation lienholder were funded out of what would otherwise have been Respondent's fees, which Respondent waived; and there was no other possible method of settlement and virtually no change of success on the merits.

III.

(Count 11 – Client Funds Discovered During Pendency of Bar Proceedings)

Whether ER 1.15(b) applied where a small balance of a former law firm's client's arbitration award was discovered *after* the commencement of the Bar's investigation; the Commission determined that Respondent was not responsible for the error of an accounting clerk in misposting the funds to another client's trust account following the law firm's closure; Respondent had not previously represented the client and did not have his current address but caused the error to be investigated, disclosed the result of the investigation, and offered to disburse the client funds to the Bar.

IV.

(Count 12 – Failure to Respond to Written Request to Review Files)

Whether Respondent's failure to respond to written requests by one of 62 clients to review case files warranted any sanction under ER 1.4 or 1.15(b), where

Respondent never received the clients' correspondence due to the intervention of a DR order giving Respondent's wife sole possession of Respondent's Arizona residence (including the annexed office, which Respondent used following his retirement); the same files had been made available to the client less then three months before; the case was dormant such that there were no foreseeable client decisions to be made for many years; and the client's claim was not adversely affected.

V.

(Sanction)

A. Proportionate Sanction Reduction

Whether the six months plus one day sanction imposed by the Commission with respect to 94-1324, 95-0497 and 97-2063 should be reduced proportionately, if File 94-1324 is dismissed, or to no more than six months if it is not.

B. Aggravation – No Prior Disciplinary History; Substantial Success In Defending Charges; Proffered Restitution

Whether the Commission erred in considering as aggravating factors: a private informal reprimand involving a $426 dispute where there was no other disciplinary history in Respondent's 25-year career; Respondent's refusal to acknowledge purported wrongdoing where he prevailed on 73 of 106 alleged violations; and Respondent's purported indifference to restitution where he attempted to deposit the client funds with the Bar.

C. Mitigation – Self-Imposed Inactive Status; Good Faith Consultation Regarding Ethical Issues; Interruption of Receipt of Mail Due to DR Order; Bar Counsel Misconduct

Whether the Commission erred in failing to consider Respondent's self-imposed four-year period of inactive status; his consultation with other experienced counsel regarding the ethical dilemma in 94-1324; the intervention of a divorce action that prevented his receipt of the client communication in 97-2013; and Bar Counsel's misconduct in failing to disclose the Bar's case backlog during discovery, advancing factual representations about the Bar's delay for which no admissible evidence existed, failing to acknowledge decisions of this Court contrary to her argument that laches is for mitigation only, and continuing to prosecute charges after concluding they should have been resolved informally simply because things had "gone too far".

STATEMENT OF MATERIAL FACTS

This disciplinary case presents unique circumstances that grow out of the confluence of three otherwise unconnected episodes: (1) the closure of the North & Barron firm and its successor in 1992 and 1993, and Respondent's assumption of responsibility in connection with the three files at issue; (2) the Bar's mid-1990s staffing crisis which led to a system-wide backlog of 290 probable cause orders, with no corresponding complaint filed and in particular no complaint filed on the probable cause orders in 94-1324 and 95-0497, until years after the probable cause orders, years after Bar counsel was appointed

and years after Respondent had retired; and (3) the filing of a divorce action by Respondent's wife in December 1996 after Respondent had substantially retired from active practice but while the underlying subject of 97-2063 was still pending.

Closure of the North & Barron Law Firm

In 1992, North & Barron, a 13-lawyer, 60-employee law firm in Phoenix ceased operations and was succeeded by North & Vaira, a comparably sized firm with offices in Phoenix and Philadelphia (RA 108-09, 115, 119). That firm ceased doing business in 1993 when the two offices separated (RA 112, 119).

Each of the files herein involves a lawsuit originally brought in 1990 or 1991 by Caroline Barron or under her direct supervision (RA 110, 137, 52, 77, 87) as to which some activity remained following the closure of North & Barron.[3]

Background of Respondent

The attorney who ultimately became accountable to the Bar for these files was Respondent. Respondent received his J.D., *magna cum laude*, from the University of Iowa in 1975 and was a post-graduate scholar at Oxford University in competition law. Before retiring at age 45, he achieved a national reputation as an antitrust trial

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[3] North & Barron was divided into practice groups. Ms. Barron headed the relevant groups (RA 110).

lawyer (RA 125, 127, 133).[4] Following his retirement, through November 1996, he continued to reside in Paradise Valley (RA 133-34). He took up residence in Monte Carlo, Monaco in 1997, following the filing of the divorce action (RA 134).

The Bar's Unreasonable and Prejudicial Delay

The Bar's complaint was based on charging letters received from nine of 53 clients in one multi-party cases (94-1324, hereinafter "*CCI*"), one of 62 in another (97-2063, hereinafter "*L&H*") and a single former law firm client, then residing in a Texas penitentiary, in 95-0497 (hereinafter "*Henry*"). The allegations in *CCI* (Counts 1-10) were complained of in charging letters sent to Respondent for response on July 11, 1994 (RA 165). A probable cause order was entered on April 11, 1995 (RA 1, 134). In *Henry* (Count 11), the charging letter was sent

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[4] Respondent's first jury trial was in 1979 as a member of the trial team in *MCI v. AT&T* (N.D. Ill.) (first billion dollar judgment in history). He was lead counsel in the *Gore-tex* implant patent/antitrust litigation before Judge Charles Hardy in this District throughout its nine-year pendency. *W.L. Gore & Associates, Inc. v. Impra, Inc.*, 16 U.S.P.Q.2d 1241 (D. Ariz. 1990); 787 F.2d 572 (Fed. Cir. 1986). He was lead counsel for the class in the *Ticor Title Insurance Antitrust* class action litigation, before Judge Stephen McNamee, involving some 500,000 purchasers of title insurance in Arizona and Wisconsin, from 1989 until it settled in late 1995, following his successful argument of the case in the U.S. Supreme Court. *Brown v. Ticor Title Ins. Co., et al.*, 982 F.2d 386 (9th Cir. 1992), 511 U.S. 117 (1994). He ceased active practice in late 1995 and closed his law office on February 15, 1996 (RA 107, 133).

to Respondent on March 27, 1995 (RA 73). A probable cause order was entered on May 17, 1996 (RA 2, 134).

The April 1995 and May 1996 probable cause orders did not result in a complaint until April 24, 1998, a delay of over 36 months in *CCI* and nearly 24 months in *Henry*. The charging letter in *L&H* was not received by the Bar until September 26, 1997, 16 months after the second probable cause order (RA 43).[5]

No witness testified for the Bar to any reason for its delay. It was later admitted that in April 1998, when the Complaint herein was filed, 290 such probable cause orders were backlogged, with no corresponding complaint filed (RA 205).[6] There is no evidence Respondent was in any way responsible for the delay.

During the period of delay, both Caroline Barron and Paula Brown (the former firm administrator) became unavailable;[7] most relevant files became unavailable;[8]

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[5] Respondent lived in Paradise Valley and was accessible at his registered Bar address for over 19 months following the probable cause order in *CCI* (RA 134). After he moved to Monte Carlo, there was no attempt by the Bar to contact him about any matter until October 1997 (RA 84, 85, 86, 201) when the charging letter in *L&H* was sent to him for response. By then, 30 months had elapsed in *CCI* and over 17 months in *Henry*.

[6] The Hearing Officer held that the Bar's staffing difficulties provide no justification for its delay (RA 43).

[7] If Ms. Brown's letters to the Bar (RA 173-176) are deemed the equivalent of a witness statement, Respondent was not prejudiced with respect to the accounting to which they are directed. *See Weiner*, p. 18, *infra* (no prejudice where witness was unavailable but his statement was admitted in evidence).

[8] As of February 1996 (a year *after* the probable cause order in *CCI*), the law firm's files were still indexed and readily

other witnesses, such as the 44 non-complaining *CCI* clients, could not longer be located;[9] and the memory of the witnesses who did testify, including Respondent (see RA 131), dimmed. By Respondent's count, during the two-day hearing on March 2-3, 2000, witnesses testified 128 times to poor or non-existent recollection of material events, conversations and documents. *See e.g.*, RA 106 ("I would say that I don't recall a lot of things. I mean a lot of time has gone by."); RA 63 ("I can't answer that honestly from '91 to 2000"); RA 68 ("It is really had to remember some of these things, it's been so long"); RA 80 ("I don't recall that. It was many years ago."); RA 102 (Q. [by Bar Counsel]: "Could you be mistaken in your recollection? A. Yes").

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accessible. *See* RA 172). Subsequently, due to a billing dispute, the 1,000 boxes of files became commingled by the storage facility such that the Hearing Examiner found they were "unavailable" to the parties, albeit through no fault of Respondent (RA 38). No client or trust records were ever destroyed and they still exist in storage in their original file boxes (RA 113). The Hearing Officer found the files became unavailable in 1998 (RA 38).

[9] In oral argument before the Commission, Bar Counsel conceded that, had the 44 absent *CCI* clients been available, the outcome below could have been different (RA 218): "[Commission Mbr. Rubin]: . . . Isn't it possible that Mr. North could have brought in 20 or 30 or 40 of these plaintiffs that chose not to bring a complaint and if they had testified . . . couldn't that have changed the outcome of this case? [Bar Counsel]: It possibly could . . . " Bar Counsel's attempt to avoid her admission by focusing only on the nine complainants ignored the fact that three of the nine were those Respondent couldn't reach and a fourth did not recall being contacted. Five had been dismissed early in the case and would have had a less extensive conversation with Respondent.

The Bar never disclosed the existence of its 290-case backlog in discovery, mentioning it for the first time at the January 21, 2000, hearing on Respondent's original laches motion, a few days before it was to be publicized by the Bar's executive director in the February 2000 issue of *Arizona Attorney*.[10] In opposing Respondent's motion, Bar Counsel made various factual representations about reasons for the Bar's delay but failed to offer any evidence to support them. The evidence that was adduced contradicted her representations.[11]

Non-Service of the Complaint

The complaint was "couriered" to Monaco in mid 1998 (RA 134). No service under Rule 55 was ever attempted or effected by the Bar.[12]

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[10] Although this disclosure came after the close of discovery, the Hearing Officer denied Respondent's motion to reopen discovery and the Commission declined to order a requested remand (RA 233).

[11] The Hearing Officer rejected Bar Counsel's reprensentation that she waited 16 months to "piggyback" the yet to be received charging letter in *L&H* because that would have required clairvoyance (RA 43). There was no evidence she waited to "piggyback" *Henry* on *CCI*; to the contrary, Bar Counsel twice was appointed to prosecute *CCI* while *Henry* was still being investigated (RA 144, 134, 135). Bar Counsel's claim that she delayed because Respondent stopped responding was contradicted by Bar Counsel Adams, who testified that the delay in *Henry* was due to an internal review, and that he continued to receive responses from Respondent or Ms. Brown on his behalf (RA 74-75).

[12] In December 1998, Respondent appeared before Bar Counsel to discuss the various charges. During this meeting,

Counts 1-10; Prosecution and Settlement of the CCI Litigation

CCI was settled by Respondent on October 15, 1993 (RA 185). The case was originally filed by Barron in 1991 on behalf of two clients – Ramirez and a co-worker at US West (RA 59) – who claimed repetitive motion injuries (carpal tunnel syndrome) from use of defendant CCI's computer keyboards as US West directory assistance operations (RA 51-52). ON January 29, 1991, Ramirez signed a fee agreement with North & Barron (RA 150) under which she was to pay an initial cost retainer of $300 each for herself and her husband but would be liable for all costs and subject to requests for additional retainers (RA 52-53, 150). Subsequently, a group of some 40 additional Ramirez co-workers joined the case on identical terms (RA 59).[13]

Bar Counsel stated that had she understood the facts, the charges would have been resolved informally but that things had "gone too far" (RA 48, 51). Shortly thereafter, Bar Counsel filed an amended complaint based in part on the information provided at the meeting.

[13] On March 1, 1991, Barron confirmed an "absolutely confidential" off-the-record deal to cap Ramirez' costs at $300.00 in light of her "extraordinary effort" in helping bring other plaintiffs into the case (RA 52-53, 58-59). Respondent had no involvement in the intake process and was unaware of Barron's "confidential" deal with Ramirez just prior to her obtaining some 40 of her co-workers as clients (RA 59, 148). After the October 15, 1993, settlement, Ms. Ramirez, unhappy with her failure to obtain meaningful recovery in a case she had promoted, tried to organize 45 of the plaintiffs to file Bar complaints against Respondent. Only nine agreed to do so (RA 99-100). At the hearing, several of the complainants "mirror-imaged" each other's testimony even where they independently

Barron, who last lived in Australia, was unavailable to testify. Respondent was not involved in the initial client meeting and could not testify of his own knowledge that the clients had been advised of potential conflict of interest (RA 148). The legal representation agreement indicates that they were. See RA150-56, ¶¶ 1.02(e) and 3.02. The Bar's witnesses could only "vaguely" recall what was discussed in the initial meeting because "[i]It's been a long time" (RA 66, 81, 97). Some did not recall what was discussed at all (RA 103). One did not recall having an initial meeting (RA 61). Another did not recognize her own executed legal representation agreement (RA 66) ("I really don't remember this to be honest with you,") and exclaimed: "How could I remember ten years ago?" (RA 67)

In May 1992, Barron announced she was retiring (RA 108-9, 124).[14] Respondent began to explore having a firm with a products liability practice either take over the case or associate as co-counsel. Respondent contacted three different personal injury specialist firms or attorneys, including the firm that had settled a virtually identical case for US West operators in Colorado (RA 136, 124-25, 127, 128). All declined because of problems they saw in proving causation, because many plaintiffs had only

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had no personal knowledge or recollection (RA 105-6). The Hearing Officer himself acknowledged Respondent's characterization of the situation was a "fair comment on the evidence" (RA 148-49).

[14] Barron was required by her termination agreement to remain with the firm as "of counsel" until November 1992 (RA 109).

minor injuries and because US West had workmen's compensation liens on any recovery (RA 125-26, 136). One of those who reviewed the file was William Revis, a certified personal injury litigator with 32 years' experience, formerly President of the Arizona Trial Lawyers Association (RA 123-24). Revis testified at the hearing.

Barron retired in November 1992 (RA 116) and North & Vaira accepted the file at that time with the consent of all clients after advising them of the qualifications of the newly assigned partners and their right to seek new counsel (RA 162A-B). The case was thereafter staffed by two partners, two associates, and a full-time paralegal (RA 136). In April 1993, Respondent personally took over the case following the separation of North & Vaira's Philadelphia office (RA 118, 137).[15]

There were two motions for summary judgment pending at the time (RA 118, 126). Respondent successfully defended the motion on product defect (RA 118, 137). However, the best expert testimony obtainable was clearly inadequate to defeat the motion on causation

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[15] Although primarily known as an antitrust lawyer, Respondent was qualified to try *CCI*. Revis testified: "[H]e was one of the primo antitrust lawyers in the country. . . . Jerry had a reputation in this community and nationally . . . and his reputation was impeccable in the type of huge cases that he handled, and while he may not have any experience in handling a products liability case before, he certainly could have educated himself in the necessary things that he would have to have proven it. I knew that form his preparation of the case and I don't have any problem at all with that" (RA 125, 127-78).

(RA 137).[16] Respondent judged that plaintiffs would lose the motion, scheduled to be heard on October 18, 1993, and the case would be dismissed (RA 118, 137). Revis concurred in this assessment (RA 125-126). The Bar does not dispute it (RA 221-22).

Settlement discussions began later August 1993 (RA 137). The discussions proceeded with the October 18 deadline in mind (RA 190), complicated by the defendant's lack of interest in settling (RA 189) and nearly $1 million in liens by US West (RA 191). By the time a settlement amount had been reached with CCI, and an award structure with US West, there were only a few days left to contact the 53 plaintiffs before the hearing (RA 137). Extensive telephone calls were undertaken personally by Respondent (RA 114, 118, 131, 137). All but three clients were contacted and consented (RA 118). Most were advised of the amount of costs for which they were liable, that the case would probably be dismissed, that the US West liens would otherwise bar recovery, that there would be differential recoveries in the settlement, and that most would receive no net recovery (RA 137, 56). Respondent provided a detailed explanation of the proposed settlement structure to those who were interested (RA 114).[17]

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[16] The evidence on causation was "merely theoretical." That would have been inadequate under the U.S. Supreme Court's *Frye* doctrine and under its *Delbert* decision, which was handed down during briefing of the motions. See RA 125-26.

[17] Respondent later received a letter from Ramirez in which she inquired about her "appeal" (RA 161-62). Ramirez was one of 17 plaintiffs who had been dismissed in June 1992 because their claims were barred by the statute of limitations (RA 158,

Respondent was openly troubled by the prospect of settling without all clients' consent, but, after consultation with Revis, concluded he had no option (RA 49-50, 126-27, 190-91). Counsel for CCI summarized the situation in a letter to his client on October 26, 1993, eleven days after the settlement (RA 190-91):

> North . . . did not believe he could conclude the case by agreeing . . . on behalf of those he could not contact. . . . The impending date of October 18, 1993, and the hearing on Defendant's Motion for Summary Judgment produced an atmosphere of time being of the essence. The fact that Mr. North had received authority from most of his clients to conclude the case . . . , the desire to conclude the matter before October 18, . . . all resulted in the creation of an agreement to permit Final Judgment to enter. . . .

Revis testified (RA 127):

> But the question was was it ethical to do that. I have the agreement by everyone except the people I can't reach . . . I said here's your choice, file a motion to withdraw [from representation of the unreachable clients] . . . That doesn't help you. . . . [T]he defendant doesn't want to settle unless all plaintiffs signed off on it. . . . So you've prejudiced all the other plaintiffs, and I suggested to him that I did not know the answer to this question. I don't know anybody who knows the answer to that question, but I can't imagine if he did what he was planning on

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54). There had been no prior discussion with Respondent about "appealing" after the case was settled (RA 60). No witness claimed she ever asked Respondent if she could "appeal" even if she "settled."

> doing that he could be criticized for that when as I saw it the only one who was losing any money on this was him . . . As a practical matter I didn't see it as a bad result. . . .

From inception to conclusion, Respondent and his firms devoted over $1,025,000 in time to the case (RA 136, 119-20, 206). Some $207,000 in costs were advanced over the small client retainers (RA 120, 100).[18] The case was "settled" for $296,477 (RA 191). Had this been treated as an "aggregate" settlement, Respondent would have received 33-1/3 percent and the balance would have insufficient to cover the costs. Plaintiffs would have received nothing and still owed money (RA 120). Instead, plaintiffs consented to entry of a judgment in favor of CCI, CCI provided a settlement fund, and Respondent worked out settlement details with US West. The settlement structure reached entailed: (1) *individual* settlement awards based exclusively on each plaintiff's relative workmen's compensation profile;[19] (2) US West's waiver of its liens on all positive net recoveries; and (3) Respondent's waiver of outstanding costs due by plaintiffs with negative net recoveries. The most seriously injured plaintiffs who had not already been dismissed received a positive, and in some cases meaningful, recovery and no plaintiff was left with a cost balance (RA 119, 120, 126-27).

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[18] Many of the clients failed to pay even the $300 initial retainer (RA 61, 66).

[19] The only exception was the 17 previously dismissed plaintiffs whose claims were barred by limitations and had nominal value at best.

Each client received a closing letter reflecting the settlement structure, their specific award[20] and the amount of fees and costs that were deducted therefrom (RA 185-86). Respondent received a total of $18,000 in either fees or interest charges on advanced costs; over $1,000,000 in time was written off (RA 119, 127).

Count 11: Incorrectly Posted Client Funds

Henry was a small securities arbitration filed by a then associate in Barron's practice group for a client incarcerated at the time in a Texas penitentiary (RA 76). A $12,600 award was obtained (RA 121). The brokerage house paid two-thirds; the broker owed one-third, but was unable to pay it all at once. An agreement was made for him to make installments (*id.*). Two installments of $1,000 and $500 apparently were received that were not recognized as Henry's by the accounting clerk helping to wind up the firm's affairs (*id.*). It appears that these funds were deposited in a trust account in Philadelphia, albeit, erroneously, an account specifically designated for another client (RA 111, 121-22). The final payment was received from the broker in late 1994 (RA 173-74). In early 1995, unaware the missing installments had been received, Respondent disbursed what he believed to be the entirety of the client funds (RA 78, 198-99).

It was not until mid-1996, during the Bar's investigation, that the missing installments were discovered by Ms. Brown, Respondent's former administrator, who, at

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[20] The "aggregate" amount of the settlement was also disclosed to interested plaintiffs (RA 98).

Respondent's request, investigated and reported her findings directly to the Bar (RA 111, 172-76). Brown could not be located to testify at the hearing, but her letters to the Bar were admitted. During settlement discussions with the Bar in 1999, Respondent, who no longer had an address for Mr. Henry, offered to deposit Henry's funds with the Bar for transmittal to him. The Bar declined (RA 33).

Count 12: Ongoing L&H Litigation

L&H was a 62-plaintiff, multi-party case against the now-defunct "Big 8" accounting firm, Laventhol & Horwath (RA 141). The case involved a Drexel Burnham sponsored investment in the Biltmore Hotel for which Laventhol made projections (RA 143). The case was stayed in 1991 due to Laventhol's bankruptcy (RA 141). Pending at the time was a parallel national class action against Laventhol and Drexel (*id.*). By 1993, all claims against Laventhol were in the bankruptcy case in the Southern District of New York (RA 177).

In February 1994, settlement of the class action permitted plaintiffs to accept the class action recovery from Drexel but "opt out" as to Laventhol (RA 141). The class recovery from Drexel was meaningful; the Laventhol recovery insignificant (RA 178-79). Respondent personally contacted the plaintiffs and advised them to "opt out" to obtain the benefit of both proceedings (RA 141).[21]

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[21] Inexplicably, the hearing officer found that Respondent had "failed to answer [complainant's] inquiries as to the effect that [the] parallel [class action] would have on their case" (RA

He also sought to "opt-out" all 62 clients on an omnibus basis (*id.*). The omnibus opt-out was rejected and individual opt-out's were required (RA 141, 207-09). A final decision on the opt-outs was not made by the federal court until late January 1996 (RA 141, 195-96).

The liquidating trust in the Laventhol bankruptcy provides payments equal to only about 1% of allowed claims (RA 143) but a larger recovery is potentially available from Laventhol's insurers (*id.*). The original 62 claims totaled about $39 million, after attorneys fees, interest and trebling. (*id.*). After deducting those who failed or were not permitted to opt out, and eliminating post-petition interest and, possibly, trebling, the likely maximum allowed claim was less than the applicable aggregate $11.5 million threshold insurance "deductible" (*id.*). Accordingly, the claims were "hostage" to the success of other claimants in the same insurance tranch (*id.*). Only if other claimants established sufficiently large claims would there be a realistic possibility of an insurance settlement. The claims would remain in "limbo" until that time (*id.*).

The Hearing Officer found that from March 1994 until April 1996, Respondent failed to respond to the complainant's inquiries about the status of his case (RA 210EE), but the Complainant testified that Respondent advised him, in August 1995, that the judge had not yet

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210F). But the hearing officer himself elicited that although he had never inquired, the complainant was so advised on at least two occasions (RA 96, RA 89). The correspondence admitted in evidence further confirmed that he had been advised (RA 178-79).

ruled on the opt-out issue (RA 90, 180) and in April 1996 informed him of the opt-out ruling and that settlement discussions had begun (RA 194-96). RA 195 clearly advised him that his claim was "ongoing" in the bankruptcy case. In September 1996, he again was advised that while he had a viable claim in the bankruptcy case, it would be years before the matter was resolved (RA 91, 143).[22]

In late 1996, Complainant asked to review the case file (RA 181). He arranged to do so at Respondent's home office annex in November 1996 but did not appear for the review (RA 122, 143, 182). He did not call to cancel or make another appointment (RA 91, 94, 122). His subsequent 1997 requests for copies were not received because an intervening DR order gave Respondent's wife exclusive possession of his Paradise Valley house, including the annexed office (RA 122, 143-44). There was no activity in the case at that time nor in the ensuing several years until September 13, 2000, when Laventhol's trustee signaled interest in resuming settlement discussions (RA 226-26A).

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[22] In her opening statement at the March 2000 hearing, Bar counsel sought to recast the complaint, alleging that Respondent had somehow "misled" Complainant by telling him his case was ongoing when it had been dismissed (RA 48). Respondent promptly objected because there is nothing in Count 12 of the amended complaint that put Respondent on notice of such a claim (*id.*). On cross-examination, the complainant was forced to admit that he had been advised of the Arizona dismissal in 1993 (RA 93, 95, see also RA 177), and knew that his claim was being prosecuted in the bankruptcy case.

REASONS FOR GRANTING THE PETITION

1. *Service.* Rule 55(b)(2) permits service of a complaint personally or by registered *and* regular first class mail but does not contemplate its application to retired non-U.S. residents for whom only personal service can be deemed adequate. See Rule 4.2(g), Ariz. R. Civ. P. Here, the Bar admits it did not even follow Rule 55: it served the complaint *neither* personally *nor* by registered *or* regular first class mail but by a substitute form of courier service not authorized by any judicial order. No principle or practice permits a party to select is own form of service. The Court should accept review to consider the service required for retired non-resident members for whom service by mail cannot be regarded as reliable.

2. *Laches.* This Court has long held that laches "would require dismissal" of a disciplinary action where there is a showing of prejudice. *In re Weiner*, 120 Ariz. 349 (1978). Nevertheless, the hearing officer, encouraged by Bar Counsel, held that laches was "purely an issue of extenuation [or] mitigation." (RA 132). On review, the Commission concluded that Respondent failed to prove prejudice and gave the Bar's delay weight as a mitigation factor only.

The record below presents a particularly strong showing of prejudice where key witnesses and files became unavailable during the period of the Bar's extraordinary delay and Bar counsel conceded in oral argument before the Commission that the outcome below could have been different but for their absence. If prejudice is not shown by this record, it cannot be established

on any record. This Court should accept review to preserve the practical integrity of its prior decisions.

3. *Vicarious Liability*. Rule 5.1 plainly limits the circumstances under which a partner is responsible for another lawyer's misconduct. Here, it was not even established that misconduct occurred. Barron may well have provided the appropriate conflict of interest advice, and obtained the appropriate consents, in 1991. There is no evidence she did not. No subsequent event occasioned an obligation on other partners or Respondent to renew such advice. The case remained in what amounted to the same law firm. (See RA 108.)

Failure to correct the Commission's erroneous ruling could inject havoc into the legal profession, which is ever more fluid, requiring partners in firms that split or merge (or even simply change name or corporate form) to incessantly revisit the intake conduct of former partners in pending cases. The Court should accept review to correct this misguided ruling and resolve the conflict it creates between ER 1.7(b) and ER 5.1.

4. *Communications*. Advising clients about the merits of their case or of the costs they owe can never be a violation of ER 1.4. To the contrary, it would be a violation *not* to do so. To the extent the Commission's decision was based exclusively on a purported nuance in the settlement conversations Respondent had with the clients ("*all* other clients have agreed to settle" versus "*all I have spoken to so far*"), the record contains clear indicia that the complaining witnesses' testimony was unreliable. Given the extraordinary passage of time and the collaboration shown to have occurred among them, testimony

that hinged on such a nuance could not supply the "clear and convincing" evidence required to establish a violation, particularly where 44 of the 49 potential witnesses, as well as Respondent's contemporaneous notes, were unavailable as a result of the Bar's delay.

5. *Aggregate Settlement.* The petition presents a question of first impression regarding Rule 1.4 and the obligation of counsel to act for unreachable clients in exigent circumstances. See Comment, Rule 1.4 ("Practical exigency may also require a lawyer to act for a client without prior consultation"). Also presented are questions of first impression regarding the application of Rule 1.8(g) to the essentially individual settlements with U.S. West, or to the purportedly "aggregate" settlement with *CCI* where, as here, the clients consented to a settlement that would provide no net recovery and counsel voluntarily distributed what would otherwise have been his fees in a wholly objective, non-discriminatory manner.

6. *Clients Funds Discovered after Disciplinary Proceedings Commence.* The Petition presents the novel question whether ER 1.15(b) applies where the client funds in question are not discovered until *after* Bar proceedings commence and, if so, whether any violation occurred in the unique circumstances presented.

7. *Sanction.* The Petition presents important questions regarding the proper consideration of various aggravating and mitigating factors, including notably whether "refusal to acknowledge wrongdoing" can, consistent with due process, be considered an aggravating factor where, as here, a respondent substantially prevails; whether "indifference to restitution" can be considered

where a respondent has offered to tender the client funds; whether good faith consultation regarding an ethical dilemma should be considered in mitigation; whether a lengthy period of inactive status (four years) can be ignored where, as here, the sanction is for a substantially lesser period (six months) and would already have been satisfied had the disciplinary case been diligently prosecuted; and whether the Commission should have considered Bar Counsel's misconduct (see ER 3.1, 3.3(1) and (3), 3.4(d) and (e), and 3.8(a) and (d)), and should not have considered reinstatement, in its sanctioning decision.

Respectfully submitted this 2nd day of January, 2001.

/s/
Gerald D.W. North
Pro Per

Copy of the foregoing Petition
And accompanying Appendix
Mailed this 2nd day of
January, 2001, to:

Shauna Miller
Maret Vessella
Bar Counsel
State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, AZ 85003-1742

BEFORE THE SUPREME COURT

OF THE STATE OF ARIZONA

In the Matter of an Inactive Member of the State Bar of Arizona **GERALD D.W. NORTH** **Bar No. 009913** Respondent	**Comm. No. 94-1324** **MOTION FOR RECONSIDERATION** **(RECEIVED MAR 22 2001)**

Pursuant to Rule 9, Rules of Supreme Court, Appellant requests reconsideration of the Court's decision herein.

The Court's decision, filed February 28, 2001, dismissed the appeal in 94-1324. The Order dismissing the appeal stated that the appropriate avenue for seeking review was the petition for review process, notwithstanding Appellant's argument that this 1994 disciplinary matter should be reviewed under Rule 53(e) as that rule existed prior to the amendments that became effective December 1, 1996, and eliminated the right of appeal. A timely Petition for Review was filed by Appellant. On March 20, 2001, however, the Court denied the Petition for Review. On March 21, 2001, Appellant learned the Court's action on the Petition by telephoning the Clerk's Office.

The particular grounds for reconsideration are:

1. That the proceeding below was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process of law; and

2. Rule 53(e), Rules of Supreme Court, as applied hereto, deprived Appellant of due process of law by depriving Appellant of the right to appeal the action of the State Bar below solely by virtue of the State Bar's failure timely to prosecute this 1994 disciplinary matter until after Rule 53(e) had been amended in late 1996 to eliminate the right of appeal; and

3. Rule 53(e), as amended in 1996, deprives an entire class of members of the State Bar affected by the State Bar's systemic case backlog of their right to an appeal – a right to which they would otherwise have been entitled; and

4. Rule 53(e), as amended, is unconstitutional under the Fourteenth Amendment to the United States Constitution, in that it permits a nonjudicial body to deprive its members of substantial rights without meaningful judicial review; and

5. The Commission's decision, from which the appeal was taken, conflicts on its face with this Court's prior decisions (further demonstrating the constitutional defect in Rule 53(e), as amended), to wit:

(a) The six-month-plus-one-day sanction imposed by the Disciplinary Commission in order to require Appellant to seek formal reinstatement, conflicts with this Court's decision in *In re Hoover,* 161 Ariz. 529 (1989) where this Court stated that a six-month-plus-one-day sanction was "unusual" and not appropriate where the Commission allowed concerns about reinstatement procedures to affect its ultimate conclusion as to the appropriate length of a sanction; and

(b) The Disciplinary Commission's decision not to dismiss those counts of the complaint that relate to 94-1324, notwithstanding the State Bar's admission that Appellant may have been prejudiced by its three-year delay, conflicts with this Court's decision in *In re Weiner* 120 Ariz. 349 (1978), where this Court held that laches "would require dismissal" where there is a showing of prejudice.

For the foregoing reasons, Appellate respectfully requests that the Court reconsider its Order dated February 28, 2001.

/s/ Gerald D.W. North
Gerald D.W. North
Pro Per

Copy mailed this 22nd day of
March, 2001, to:

Shauna R. Miller
State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, AZ 85003-1742

BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA

In the Matter of a Member of the State Bar of Arizona:	)	
GERALD D.W. NORTH Bar No. 009913	)	Disciplinary Nos. 94-1324 95-0497 97-2063
Respondent.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Filed Sept. 26, 2000)

Phoenix, Arizona
September 16, 2000
10:20 a.m.

ATWOOD
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BY: JENNIFER SCHUCK, RMR
Certified Court Reporter
Certificate #50020

PREPARED FOR:
SUPREME COURT

ORIGINAL

[2] HEARING BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA IN THE MATTER OF GERALD D.W. NORTH, RESPONDENT, held at 10:20 a.m. on September 16, 2000, at the State of Arizona Supreme court, 1501 West Washington, Phoenix, Arizona, in the presence of:

MR. DAVID D. DODGE, Commission Chairman

MR. PETER CAHILL, Commission Member

MS. CYNTHIA CHOATE, Ad Hoc Commission Member

MR. CRAIG MEHRENS, Ad Hoc Commission Member

DR. STEVEN G. NELSON, Commission Member

DR. JACK L. POTTS, Ad Hoc Commission Member

MR. WILLIAM L. RUBIN, Commission Member

FOR THE STATE BAR:

MS. SHAUNA MILLER

MS. MARET VESSELLA

FOR THE RESPONDENT:

MR. GERALD, D.W. NORTH, pro per

DISCIPLINARY COMMISSION STAFF PRESENT:

MS. KENDRA DIEGAN, Disciplinary Clerk

MS. MICHELE SMITH, Legal Assistant

MS. CHRIS HASTINGS, Commission Secretary

MS. KRISTEN D. LECUYER, Commision Assistant

ALSO PRESENT: JENNIFER SCHUCK, CSR, RMR

Phoenix, Arizona
September 16, 2000
10:20 a.m.

[3] PROCEEDINGS

MR. DODGE: This is the time, date, and place set for hearing in public session in file numbers 94-1324, 95-0497, and 97-2063. Seven members of the Disciplinary Commission of the Supreme Court of Arizona are present constituting a quorum. Please state your appearances for the record.

MS. MILLER: Shauna Miller appearing on behalf of the State Bar, and co-counsel Maret Vessella.

MR. DODGE: Good morning.

MR. NORTH: Gerald North on behalf of myself.

MR. DODGE: Good morning, Mr. North.

MR. NORTH: Good morning.

* * *

MR. RUBIN: Let's assume if Mr. North can show prejudice that dismissal is a remedy that we could consider, okay? Isn't it possible that Mr. North could have brought in 20 or 30 or 40 of these plaintiffs that chose not to bring a complaint? And if they had testified, no, I understood what was going on and Mr. North explained everything and I was very happy with his communication

and how he explained the settlement, couldn't that have changed the outcome of this case?

MS. MILLER: It possibly could, but you still have clients that have already testified that they didn't get that information. This wasn't a class-action suit. He had a duty to every single client of his as an individual to talk to them,. . . .

* * *

[26] DR. POTTS: Can you respond to 1.4 and the comments to that regarding if you get ahold of something – his contact with Mr. Revis regarding, I'm in an ethical quandary? Here I have a time limit. What do I do? Usually, I find that in my profession – and I also find that in the legal profession – to be a good way for lawyers to at least – to show that they have attempted to do what's an ethical consult in consulting a colleague. We find that in practice. And I think the Bar recommends that strongly. I know the Bar recommends that strongly. The question is: Would you comment on his doing that?

MS. MILLER: That is certainly an avenue that you can take. However, just because you are consulting with someone and how to settle a lawsuit and the way to go about it, which is, I believe, mostly what was talked about, doesn't relieve you of other ethical obligations such as consulting with your client. Even though there may be some small [27] mitigating factor in him going to somebody else and trying to determine which is the best way to divvy up this finite source of money that's going to be coming in, he still didn't discuss it with his clients. How can you make a decision for your client when you don't talk to them about how you are doing it?

DR. POTTS: Point wasn't talking to the consultant. The point was now I can't contact these three, what should I do in this case? Do I need to go past the deadline? How many complainants did the Bar pull in? 45 complainants did I hear? I heard something. I misheard something from the beginning. How did you do initial discovery prior to the probable cause? Did you bring in a lot of the plaintiffs?

MS. MILLER: I was not Bar counsel at that time.

DR. POTTS: Did the Bar simply get complaints from nine people?

MS. MILLER: Yes.

DR. POTTS: Did they talk to the Bar in the discovery phase prior to the filing of the complaint? Did they have contact with other members who said they didn't want to file a complaint?

MS. MILLER: We didn't know any of the other 45 names; and we, as far as I know, did not ask for [28] those names either. We normally don't go out and recruit complainants. If they come to us with a complaint, we follow it along. If we needed the evidence to support one of our allegations, we certainly would have tried to find somebody. But we didn't need it.

DR. POTTS: None of the other 44 were contacted?

MS. MILLER: No. As far as I know, none of the other 44, 45, were contacted.

MR. RUBIN: Mr. North has argued that on October 13th, '93, or soon after that the product liability

case was going to be dismissed on the basis of causation. The Bar does not dispute that, does it?

MS. MILLER: That it was going to be dismissed?

MR. RUBIN: Right.

MS. MILLER: I can't answer that other than the fact that there was a motion for summary judgment pending at that time.

MR. RUBIN: There is no – the Bar doesn't have an expert or isn't disputing the independent professional judgment that Mr. North made, that this is not a good case and it is going to be dismissed in the summary judgment?

[29] MS. MILLER: No, I don't think we are contesting that. What we are contesting is that when he decided that this case was not viable, he needed to discuss that with his clients. So – which was – And I must point out that he said that he was stuck with this case, and that's not entirely correctly true. He changed from North & Barron to North & Vaira, a totally new law firm, sent out letters to these people saying we will take over your case as the new law firm. He could have just as easily said, We are dissolving your old law firm. We will not be continuing with these cases and, therefore, we need to make arrangements with you to find new counsel.

They didn't do that. They just took over the cases. So it wasn't like this was thrust upon him. They had a chance at that point. They were able to send out letters to all those people telling them they were taking over. They

easily could send out a letter saying they weren't taking over. We have reviewed your case, and we don't think we want it and so we need to decide what you want to do with it. It was that simple. There is plenty of evidence in the record from the letters that were sent that they did get some information.

MR. DODGE: They were in litigation at the [30] time, though, weren't they, when that happened?

MS. MILLER: They were in litigation.

MR. DODGE: Yeah.

MS. MILLER: The complaint had been filed. There was ongoing –

MR. DODGE: You just don't write a letter at that point to a client saying we can't handle the case anymore. You have to go to the Court to have that done. It wasn't a simple matter just writing a letter. There was more to it than that. But they could have maybe attempted is what you are trying to say.

MS. MILLER: Yeah. The whole point is there were certain avenues that could have at least been attempted that were not.

* * *

[35] MR. RUBIN: Before you sum up, I want to ask a question about delay and it being mitigating versus grounds for dismissal. Tell me what we do with In Re: Weiner and In Re: Murphy. Don't those cases stand for the proposition that it's grounds for [36] dismissal, not mitigation?

MS. MILLER: I'm not familiar with those cases. I'm sorry. In Re?

MR. RUBIN: Weiner, *120 Arizona 349*, 1978, and In Re: Murphy, *159 Arizona 280*, 1988.

MS. MILLER: Unless –

MR. RUBIN: They were cited in Mr. North's brief.

MS. MILLER: I only remember In Re: – the paternity one. Maybe – Was that in his last reply?

MR. RUBIN: It was not in his last reply. It was in his original reply.

MS. MILLER: I'm sorry. I don't recall those. That's probably my fault.

* * *

Arizona Attorney

Vol. 36, No. 6 • February 2000

* * *

Protecting the public is still the number-one goal of the discipline department. Don't let all of our changes lead you to believe we are getting soft on attorneys who violate the Arizona Supreme Court's Rules of Professional Conduct. In fact, we are now better equipped to focus on those few lawyers who are truly causing harm. The numbers help tell this part of the story.

Through much of the 1990s, despite the fastest population growth in America and an increasing number of

[Case Backlog Reduced Chart Omitted In Printing]

complaints, the size of our discipline staff stayed relatively unchanged. Naturally, our case backlog grew until we committed to fixing the problem. With support from the Arizona Supreme Court, the Board of Governors approved adding 20 more people to our discipline department. The extra resources, combined with effective programs, have made a significant difference. In April of 1998 we had a sizeable backlog: 290 probable cause orders signed but no corresponding complaints filed. As of December 1999, that number has been cut to 36. That's more than an 85 percent decrease in our backlog in a year and a half.

And while we are rapidly reducing the backlog, we are also more actively dealing with problem lawyers. In 1997 we filed a total of 20 formal complaints against attorneys. In 1999 we filed 189 complaints. That's a

seven-fold increase in handling the most serious matters; a seven-fold increase in protecting the public.

* * *

–Stuart Forsyth, Executive Director